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PART I

Symposium

RECENT DEVELOPMENTS UNDER THE ANTITRUST LAWS

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MARSHALL C. GARDNER, *Chairman*
Antitrust and Trade Regulation Law Committee

DEVELOPMENTS UNDER THE ANTIMERGER ACT AND OTHER ASPECTS OF THE FEDERAL TRADE COMMISSION'S ANTITRUST PROGRAM

by

EARL W. KINTNER*

I.

As Federal Government lawyers, past or present, we have the professional duty to assist private practitioners of law, the business community, and the public to understand government programs as they are. Questions of policy for the Congress and the people can be better decided on the basis of full knowledge rather than on the basis of assumptions which may not in fact be correct.

The shared responsibilities of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws may be less well understood than they ought to be. It is my impression from direct observation and from talking with law students who apply to the Trade Commission for employment that the law schools cover the substantive law well, but, perhaps because of lack of time, pay little attention to the sharing of responsibility which exists in this area.

Section 11 of the Clayton Act delegates authority to enforce compliance with Sections 2, 3, 7, and 8 to the Federal Trade Commission as to "all character of commerce" except for certain specified industries regulated by other agencies. Section 15 invests the District Courts of the United States with jurisdiction to prevent and restrain violations of the Act and provides that "it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." Although the Sherman Act provides no direct responsibility for its enforcement to the Federal Trade Commission, the Supreme Court has held that "the Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition [prohibited by Section 5 of the Federal Trade Commission Act] even though the

* Chairman, Federal Trade Commission.

selfsame conduct may also violate the Sherman Act." [1] In the *Cement* case, the Supreme Court also noted "A strong Congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice . . . but also to supplement that enforcement through the administrative process of the new Trade Commission." The aim was "to provide the Government with cumulative remedies against activity detrimental to competition."

II.

Government enforcement of Section 7 of the Clayton Act has indeed been shared. As of August 25, 1960, 106 complaints had been filed against alleged illegal mergers since 1914. Of these, 53 were issued by the Federal Trade Commission and 53 filed by the Attorney General. Since the 1950 amendment of Section 7, the Attorney General has filed 33 complaints alleging violations and the Commission has issued 40.[2]

The Attorney General as a cabinet officer directly responsible to the President, is a close partner in any White House administration. The Federal Trade Commission, with five commissioners nominated by the President and confirmed by the Senate for fixed terms, is an independent regulatory agency. As Commissioner Humphrey's executor firmly established, members of the Federal Trade Commission do not hold office at the pleasure of the President. *Humphrey's Executor* v. *United States,* 395 U. S. 602 (1935). However, the national administration's power to designate the agency's members on a bipartisan basis implies, as it should, heavy responsibility for selection of capable appointees and continuing interest in the agency doing an effective, fair enforcement factor which may be considered in coming to such an agreement is prior experience with the industry in question by one agency or the other. Other considerations are also relevant. The Federal Trade Commission, despite its repeated recommendations to the Congress, has not been granted authority to seek pre-merger injunctions. The Attorney General has such authority. On the other hand, the Attorney General, despite his recommendations to the Congress, has not been granted authority to compel the production of evidence in civil matters. In this respect, the Commission's powers

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1 *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 693 (1948).

2 All figures as of August 25, 1960.

of inquiry are broad, far-reaching and well-defined by court interpretation.

Current antimerger efforts of both the Federal Trade Commission and the Justice Department are substantial. Since the 1950 amendment of Section 7 of the Clayton Act, 73 actions or proceedings have been initiated, 40 by the Trade Commission and 33 by the Justice Department. Of these, 55 are still pending at various stages in the administrative hearing, trial court or appellate review. The field promises to be a fertile one for further legal development in the years to come. Twenty-nine matters are pending before the Federal Trade Commission awaiting hearings, initial decision by the hearing examiner, or decision by the Commission. Four Commission orders are under review in the courts of appeals. Twenty-two Justice Department cases are at various stages of litigation. During calendar year 1960, 18 new proceedings were instituted, 11 by the Federal Trade Commission and 7 by the Justice Department.

During the past year the Commission issued 4 merger decisions with opinions which are worthy of careful study (*Erie Sand and Gravel Company,* FTC Docket 6670, Opinion of Commission (October 26, 1959); *Reynolds Metals Company,* FTC Docket 7009, Opinion of Commission (January 21, 1960); *Brillo Manufacturing Company, Inc.,* FTC Docket 6557, Opinion of Commission (March 25, 1960); *A. G. Spalding & Bros., Inc.,* FTC Docket 6478, Opinion of Commission (March 30, 1960)). Only in recent years has the Commission issued as a matter of practice an opinion discussing the reasons for its decision in an adjudicated case. For roughly 40 years of its existence, the Commission issued no opinions but merely formal complaints, findings, and orders, despite the reasons originally suggested by Woodrow Wilson for the creation of the Commission. President Wilson stated:

> "Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.
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> * * * * *
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> ". . . the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, and definite guidance

> and information which can be supplied by an administrative body . . ." [3]

For several reasons I shall not attempt to review for you here the four latest merger decisions of the Commission. The opinions speak best for themselves. Scholarly review is already available in a statement by Commissioner Tait entitled "Significant New Commission Developments," given before the Section of Antitrust Law of the American Bar Association on August 29, 1960. Also the "Developments in Antitrust During the Past Year," an annual review by Professor Oppenheim contains a complete review of all antitrust matters including Commission merger cases.

The Federal Trade Commission's stepped-up program against deceptive advertising and its program to eliminate payola may have given some the impression, because of the publicity which these activities have received, that the Commission has neglected or de-emphasized its efforts to prevent illegal mergers and other antitrust violations. I should like to correct any such false impression which may exist among you here. In fiscal year 1960, the Federal Trade Commission issued 11 merger complaints compared with 3 issued in fiscal 1959. Our total antideceptive practices complaints increased from 272 in fiscal 1959 to 348 in fiscal 1960, but antimonopoly complaints issued increased in even greater proportion, from 80 in fiscal 1959 to 157 in fiscal 1960. The number of antimonopoly complaints for fiscal 1960 (157) was nearly 4 times the 10-year average of 1949 to 1958 (41.4).

III.

Enforcement of Section 2 of the Clayton Act as amended by the Robinson-Patman Act has traditionally received far greater emphasis from the Federal Trade Commission than from the Department of Justice. Indeed, the Department traditionally has left Robinson-Patman enforcement to the Commission.

During the past fiscal year the Commission issued 130 complaints alleging violations of the Robinson-Patman Act. This more than doubled the number of complaints issued in any previous fiscal year since 1936 except 1959, during which the Commission issued a

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[3] Messages and Papers of the Presidents, Vol. XVI, at p. 7916.

record number of 66 complaints. Despite this dramatic increase, it seems clear to me that we have only scratched the surface. A glance at investigation figures shows that the mine is far from dry. On June 30, 1959, the Commission's Bureau of Investigation had pending 249 investigations of alleged Robinson-Patman violations. By June 30, 1960, this number had more than doubled. As of that date, 504 Robinson-Patman investigations were pending. (It may be also of incidental interest to note that this increase was in greater proportion than the substantial increase in total number of investigations under all statutes during this period. On June 30, 1959, 1,248 investigations were pending. On June 30, 1960, 2,089 investigations were pending.)

The Commission during the past year has taken several novel steps in its program of Robinson-Patman enforcement. Some of the current new developments began with the appointment of a staff Task Force last November. Ten members of the staff drawn from each one of the Offices and Bureaus set to work thinking about how the Commission might better carry out its Robinson-Patman enforcement responsibilities. The Task Force made two specific recommendations: that Guides for compliance with Sections 2(d) and (e) be issued by the Commission; and that the Commission consider the use of its powers to require reports under Section 6 of the Federal Trade Commission Act for the speedy investigation of appropriate cases. These recommendations were adopted.

Guides drafted by the Task Force have been issued and enthusiastically received and carefully studied by much of the business community. There is reason to believe that these Guides have been genuinely useful, particularly to small businessmen.

Section 6(b) of the Federal Trade Commission Act[4] authorizes the Commission "To require, by . . . special orders, corporations engaged in commerce, . . . to file with the commission in such form as the commission may prescribe . . . special . . . reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the [reporting corporation's] organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals . . ." The Act provides that the reports and answers shall be made under oath or

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[4] 15 U. S. C. §46 (1958).

otherwise as the Commission may require, and that they must be filed within a reasonable period prescribed by the Commission. Section 10 of the Act provides that, if any corporation required to file a special report fails to do so, a forfeiture of $100 for each day shall accrue following notice of default. The forfeiture may be recovered in a civil suit brought in the name of the United States in the district where the corporation has its principal office or in any district in which it does business.

The power to require special reports from corporations has been exercised in several ways throughout the history of the Commission. Section 6 reports have been used to gather information for the Quarterly Financial Report for Manufacturing Corporations, prepared jointly by the Federal Trade Commission and the Securities and Exchange Commission. Extensive use of this special report power has been made in connection with general economic surveys conducted by the Commission. And special reports have been used to gather data for use in the trial of specific antimonopoly cases, particularly merger cases, and to investigate compliance with outstanding Commission orders. However, the special report power has never been used to conduct a general legal investigation of alleged violations of the antitrust laws throughout an entire industry.

The Commission has now proceeded with the use of its Section 6 powers for the first time on something more than a hesitant basis. Building on the knowledge gained from an economic study of food distribution, questionnaires have been sent to 442 corporations in the food industry. Orders to file reports went to 113 suppliers and 211 grocery chains, including voluntary and cooperative organizations, to determine whether Sections 2(d) and 2(e) were being violated by the questioned corporations. Substantial numbers of reports have been received; some respondents have requested and been granted additional time to prepare and file the required reports.

In a related inquiry, orders to file special reports were sent to 118 members of the Florida Fresh Citrus Fruit Industry to determine whether the brokerage provisions of the Robinson-Patman Act had been violated. All 118 have already complied with the orders and filed the required reports. In addition, 12 members of the same industry in California, Arizona, and Texas, accounting for 93% of

the dollar volume of sales in these three States, have been sent similar questionnaires so that equity will be accorded to the whole industry. As of August 10, 54 complaints charging violation of Section 2(c) of the Act had resulted from the Florida Citrus inquiry alone.

Initial results from the use of this technique have justified every expectation. Quick, inexpensive and efficient investigation of industry-wide practices has been achieved. With the use of this technique the Commission can respond to the claim that an individual company cited for violation of the Act would be at a competitive disadvantage unless all other violators within the industry were similarly cited. All violations within an industry can be dealt with more quickly and simultaneously. And this improvement can be achieved without tremendous increases in manpower. Clearly the use of this technique breathes new life into the enforcement of the Robinson-Patman Act.

As responsible members of the Bar know, the Commission has recognized that one of the most important problems it faces is the equitable and judicious use of the discretion which the Supreme Court, in the *Moog* and *Niehoff* cases,[5] has said rests with the Commission. The Commission is constantly seeking means to eliminate inequities in enforcement. Where it may appear that widespread violations of Section 2 of the Clayton Act are occurring throughout an industry, the Commission will give serious consideration to the requiring of Section 6 special reports from members of that industry. I should emphasize though that the Commission has no intention of using this power as a means of harassment or to conduct mere fishing expeditions. The Commission will require special reports on an industry-wide basis only where there is substantial reason to believe that many members of an industry are engaged in unlawful practices.

We may also anticipate that Section 6 reports will be required in individual instances from recalcitrant firms which refuse voluntarily to cooperate with the Federal Trade Commission investigator. In other appropriate individual instances we anticipate the Section 6 reports may be used where information may be more easily gathered than by personal visit of an investigator because of distance of a corporation from a field office, necessity of speedy handling, relative simplicity of information required, or other practical considerations.

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[5] *Moog Industries* v. *Federal Trade Commission; Federal Trade Commission* v. *C. E. Niehoff & Co.*, 355 U. S. 411 (1958).

IV.

Last month the Commission issued its decision and opinion in the matter of the *Grand Union Company,* Docket 6973. The Commission held that the knowing inducement or receipt of discriminatory advertising allowances which are prohibited by Section 2(d) of the Clayton Act constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Commissioner Tait dissented from this decision. To those of you who are interested in Robinson-Patman matters, I recommend a careful reading of both the majority opinion and the dissent in *Grand Union.* This case presents, I believe, some truly significant basic problems in trade regulation.

As of August 31, 1960, the following Clayton Act complaints were pending at one or another stage of administrative adjudication before final decision by the Commission:

Section	2(a)	74	complaints
"	2(c)	63	"
"	2(d)	50	"
"	2(e)	5	"
"	2(f)	9	"

We can be sure that, although many of these will probably result in consent orders, a few will present difficult decisions. I am confident that this group of Federal Bar Association lawyers interested in effective antitrust enforcement can be counted on to interpret these decisions for the Bar and the business community with a spirit of understanding and constructive comment.

RECENT DEVELOPMENTS UNDER THE SHERMAN ACT AND CLAYTON ACT AND OTHER ASPECTS OF THE PROGRAM OF THE ANTITRUST DIVISION

by

George D. Reycraft*

It is indeed an honor to appear at this National Convention of the Federal Bar Association to join in your discussion of recent developments in the antitrust field.

Approaching this subject from the viewpoint of the Antitrust Division, the first area of interest is in the cases decided under the Sherman Act. From July 1959 to this month there have been a number of important court opinions in Sherman Act cases in which the United States was plaintiff. I will first try to cover some of the more interesting aspects of these opinions.

Second, I would like to turn to a brief analysis of Clayton Act Section 7 decisions in cases brought by the Antitrust Division. The decisions in the three Section 7 cases, which were decided during the year, are of interest not only on their merits but also on the question of the type of relief to be entered by a court for violations of this statute.

There have also been important decisions during the year on the retention of the selling or acquired company as a party in Section 7 litigation as well as the acquiring company.

Perhaps the most important issue to come up during the year if Section 7 is to retain its force as a means of preventing undue concentration of industry is whether an unlawful acquisition may be remedied by any judicial restraints short of divestiture. In this connection, I will review three final judgments entered during the year in Section 7 cases by consent in each of which divestiture was the crucial relief obtained and two district court opinions discussing the subject of relief.

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* Chief, Special Trial Section, Antitrust Division, Department of Justice.

I.

Sherman Act Litigation

(a) *Parke-Davis*

The Supreme Court's decision in the *Parke-Davis* case[1] gave explicit notice to a seller that any effort to combine with others to intervene in the price-making decisions of its distributors or retailers would expose the seller to prosecution under the Sherman Act where no fair trade immunity was present. The opinion also indicates that closer scrutiny may be given to any refusal to deal where the object of the refusal is the regulation of the manner in which the distributor resells its products. As the Court put it: "Parke-Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke-Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke-Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices." [2]

The Court found that, on the evidence, Parke-Davis had organized "a price-maintenance combination or conspiracy." Justice Stewart in his concurring opinion placed his agreement with the majority on the basis that "the present record shows an illegal combination to maintain retail prices."

(b) *Gamble-Skogmo*

A distinction between combination and conspiracy was also drawn in the Government's case against Gamble-Skogmo and Western Auto. The complaint in that case charged that the acquisition by Gamble-Skogmo of a controlling interest in Western Auto had brought to fruition a course of conduct designed to unify Western Auto and Gamble-Skogmo and to eliminate competition between them in violation of Section 1 of the Sherman Act. The stock acquisition was also attacked under Section 7 of the Clayton Act.[3] Western Auto moved to dismiss the Section 1 charge on the ground that the com-

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1 *United States* v. *Parke-Davis and Company*, 362 U. S. 29 (1960).

2 See note 2 *supra*, at 45.

3 *United States* v. *Gamble-Skogmo Inc., et al.*, 1960 Trade Cases, Par. 45,060 (Case 1913) (W. D. Mo., April 1, 1960).

plaint did not allege any facts from which it could be inferred that Western Auto had been a party to an unlawful contract, combination or conspiracy. The district court denied the motion to dismiss finding the allegations in the complaint sufficient. The cases relied on by the Government were the combination cases involving several early railroad mergers.[4]

The essential distinction between a charge of combination and a charge of conspiracy is that a combination, like a contract, which unreasonably restrains trade is unlawful under Section 1 without regard to the motives of the parties. If the combination in fact unreasonably restrains trade it is irrelevant that one or both of the parties did not intend this result, or even that one of the parties—as may or may not have been true of Western Auto and the Parke-Davis distributors—had not voluntarily joined the combination.

(c) *American Smelting & Refining and Screen Gems*

A combination of competitors was also at issue in two cases in the Southern District of New York where two district court judges during the past year had occasion to consider the legality under the Sherman Act of contracts under which one competitor distributed the products of another. In the first of the two cases to be decided, *United States* v. *American Smelting & Refining Company, St. Joseph Lead Company and the Bunker Hill Lead Company,*[5] Judge Edelstein found the arrangement to violate Section 1 of the Sherman Act. In the *Columbia-Screen Gems* case,[6] decided about three months after the *American Smelting* case, Judge Herlands found no violation without citing or distinguishing Judge Edelstein's opinion. The dissimilar results in two cases, which involved very similar legal issues, in the same court within a three month period invite critical analysis.

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[4] *United States* v. *Southern Pac. Co.*, 259 U. S. 214, 229-30 (1921); *United States* v. *Reading Company, et al.*, 253 U. S. 26, 58 (1916); *United States* v. *Union Pacific R.R. Co.*, 226 U. S. 85-6 (1912). Brief of the United States filed in opposition to the Motion to Dismiss by defendant Western Auto Supply Company, dated May 27, 1960. *United States* v. *Gamble-Skogmo, et al.*, Civ. No. 12776 (W. D. Mo., 1960).

[5] 1960 Trade Cases, Par. 69,675 (S. D. N. Y., April 7, 1960).

[6] *United States* v. *Columbia Pictures Corporation, et al.*, 1960 Trade Cases, Par. 69,766 (S. D. N. Y., July 1, 1960).

The *American Smelting* case involved contracts between St. Joseph Lead Company and The Bunker Hill Company. They are, respectively, the largest and second largest miners of lead in the United States. Judge Edelstein found that, prior to the agreements between St. Joe and Bunker Hill, Bunker Hill lead was being sold at prices below the price being maintained by American Smelting & Refining Co., the largest smelter and refiner of lead in the United States. Thereafter, in 1922, St. Joe and Bunker Hill entered into a succession of contracts under which St. Joe became the exclusive seller of Bunker Hill lead in the eastern part of the United States. The contracts provided that St. Joe would endeavor to sell Bunker Hill lead for corroding purposes at a premium price over the price of common lead. Beginning in 1951 the contracts provided that Bunker Hill was entitled to a formula percentage of St. Joe's total sales. The prices at which the lead of both companies was sold in the eastern part of the United States had been set by St. Joe.

The Government contended that the arrangement between St. Joe and Bunker Hill constituted a combination to fix prices and to divide markets in violation of Section 1 of the Sherman Act. Judge Edelstein agreed with this position finding that the effect of the arrangement had been to preclude either of the companies from independently determining the price at which they sell lead. In so doing, Judge Edelstein referred to the *Masonite* case[7] in which the Supreme Court said:

> The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.

Moreover, the district court found "the availability of St. Joe's experienced and expert sales organization in the east, eliminating for Bunker Hill the trouble and expense of having one of its own, can only be regarded as incidental (nor would such an economic consideration be relevant to the issue of whether there has been an antitrust violation. . . .)." [8]

Within three months after Judge Edelstein's opinion in the *American Smelting* case, Judge Herlands, sitting in the same court, found

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[7] *United States* v. *Masonite Corp.*, 316 U. S. 265, 276 (1942).

[8] See note 5 *supra*, at p. 76,681.

what appears to be similar distribution arrangement between Columbia Pictures Corporation and Universal Pictures Company, providing for the distribution of Universal feature films for exhibition on television through Columbia's subsidiary, Screen Gems, to be reasonably ancillary to the dominant purpose of the defendants in entering into the arrangement and was not violative of Section 1 of the Sherman Act.

The agreement between Screen Gems and Universal provided that Screen Gems was to distribute the features "diligently in order that the greatest possible revenues may be realized for itself and Universal," to release not less than 78 Universal features in each of the six annual periods, to negotiate with sublicensees as to the Universal features on a "non-discriminatory basis, to make annual minimum payments to Universal totalling $20,000,000 over seven years, and after recouping certain distribution expenses, Screen Gems was to be paid a percentage of the net proceeds as its fee for distributing the features.[9] The agreement further provided "that all sales and other policies relating to Universal features and their distribution should be formulated jointly by Screen Gems and Universal," that "Screen Gems would not grant any sublicensee for Universal's pictures on terms less favorable than for Columbia's," and that Screen Gems would submit to Universal "a schedule of prices below which Screen Gems was not to sublicense" the features without approval of Universal, and this was to be in advance of such release.[10] Under the agreement, Universal was permitted to audit Screen Gems's sales records, to require Screen Gems to render reports showing the Universal features included in each sublicensing agreement as well as other films included in the same transaction.[11] It was also provided that the revenues received from a sublicense, both as to Universal and Columbia features included therein, shall be allocated between Universal and Screen Gems according to values assigned by both defendants to each feature included in the sublicense; to effectuate this purpose, where a package of feature films included both Universal and Columbia features, the defendants agreed that proportion of the revenues at-

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9 See note 6 *supra*, at p. 76,986.

10 *Id.* at pp. 76,986-7.

11 *Ibid.*

tributable to each was to be on the basis of the relative value of the features contributed by each to the package.[12]

The Government contended that the agreement expressed the intentions of the parties and on its face was one which in its performance would unreasonably restrain trade without regard to the parties' motives, which presumably was to obtain the greatest financial return for the distribution of the features. The Government had in fact stipulated that the agreement was the result of arm's length bargaining and the parties thereto did not have the motive to fix prices within the meaning of Section 1 of the Sherman Act. But the provisions of the contract respecting price, the Government alleged, made the agreement illegal *per se,* and that whether or not the arrangements in the agreement respecting price were illegal *per se,* they unreasonably restrained trade.[13]

In passing on the legality of the agreement, the district court held that "[a]n agreement to fix prices is illegal *per se,* without regard to motive, market control, or the amount of commerce affected." [14] But the court, relying on the "Doctrine of Ancillary Restraints," concludes a little later in its opinion that the agreement in question was not violative of the Sherman Act since "[t]he evidence establishes the total lack of purpose, intent or motive to fix prices." [15] This evidence, relied upon by Judge Herlands for the finding of reasonableness, fell into two categories: (1) testimony by officers of the defendants that there was no intention to fix prices or eliminate competition by entering into the agreement; and (2) testimony that Universal did not have its own distribution organization, that Screen Gems did and this was the dominant purpose of the two defendants in entering into the agreement.

Thus, the economic justification given by the defendants as to the availability of a distribution organization by one member of a combination, which Judge Edelstein found in the *American Smelting* case to be "irrelevant," was found by Judge Herlands in the *Screen*

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[12] The allocation proportion was to be achieved by assigning to each feature in the package a classification, either "A," "B," "C" or "D," according to its relative value. *Ibid.*

[13] *Id.* at p. 76,988.

[14] *Ibid.*

[15] *Ibid.*

Gems case not only relevant but apparently was the controlling factor in concluding that the agreement under attack was reasonable and not a violation of Section 1 of the Sherman Act. This latter court held that since the defendants did not regard the agreement as violating the Sherman Act when they entered into it, the defendants therefore lacked the requisite unlawful intent.

A comparison of the factual situations existing in these two cases indicates that the only difference of substance existing between them is the industries and products involved. In the *American Smelting* case, St. Joe and Bunker Hill are the two largest lead mining companies in the United States. In the *Screen Gems* case, Columbia and Universal are two of the leading film producing companies in the United States with Screen Gems being a leading distributor of television feature films. As discussed previously, the common distribution arrangement entered into by the defendants in both cases was very similar.

Whether or not these factual differences are in fact sufficient to warrant different legal conclusions on similar distribution arrangements, it seems clear that the nature of the product involved must have been in the forefront of Judge Herlands' mind in reaching his result.

(d) *Bitz*

The United States in the *Bitz* case[16] appealed a decision of the District Court for the Southern District of New York dismissing a count in an indictment under Section 1 of the Sherman Act, charging an unlawful combination and conspiracy in restraint of trade in the wholesale distribution and sale of newspapers and magazines. The indictment charged that the terms of the conspiracy were:

> a. To restrain the members of Suburban Wholesalers in their wholesale distribution of newspapers and magazines by coercing and compelling said members to pay to the conspirators various sums of money, as a prerequisite to obtaining labor contracts with the Union to avoid strikes or the continuation of strikes already called by said Union;

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16 *United States* v. *Irving Bitz, et al.*, 179 F. Supp. 80 (S. D. N. Y., 1959).

b. To prevent the shipment of newspapers and magazines in interstate commerce to members of Suburban Wholesalers not acceding to the demands of the conspirators; and

c. To hinder and exclude or attempt to hinder and exclude actual or potential competitors of defendants Irving Bitz, Charles Gordon and Bi-County.[17]

The district court held that "it is only in cases of such *per se* violations as price fixing, division of markets, group boycotts and tying arrangements that proof of public injury is unnecessary, that "Count One lacks any allegation of public injury or of facts from which it can be inferred," and "[s]ince it does not allege one of the per se violations of the Sherman Act the count is insufficient in law." [18]

The 2nd Circuit Court of Appeals unanimously reversed, holding that the pleading contained adequate allegation of public injury or allegations of facts from which public injury could be inferred.[19] The appellate court did not decide the broader questions whether it is necessary at all to allege public injury or facts from which it may be inferred in antitrust cases brought by the United States which do not allege *per se* violations, or whether Count One in fact alleged a *per se* violation.

(c) *Maryland, Virginia Milk*

Since the last meeting of this committee of the Federal Bar Association, the Supreme Court in the *Maryland, Virginia Milk* case has set forth some additional guideposts regarding the extent to which the Capper-Volstead Act exempts agricultural cooperatives from the operations of the antitrust laws. The *Maryland, Virginia Milk* case[20] was an action brought by the United States against an agricultural cooperative, the Maryland and Virginia Milk Producers Association, Inc., under Sections 2 and 3 of the Sherman Act and Section 7 of the Clayton Act. The Association supplies about 86% of the milk purchased in the Washington, D. C. area. It had acquired its largest

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17 *Id.* at 82.

18 *Id.* at 85.

19 Opinion rendered on August 26, 1960 and unreported to date.

20 *United States* v. *Maryland and Virginia Milk Producers Association, Inc.*, 167 F. Supp. 799 (D. D. C., 1959).

competitor in that area, Embassy Dairy. Its defense to this action was that as a cooperative it had been completely exempted and immunized from the antitrust laws by the Capper-Volstead Act.[21]

On the Section 2, Sherman Act issue the district court upheld the antitrust immunity defense and dismissed the charges but permitted the Government to go to trial on the Section 3, Sherman Act and the Clayton Act charges.[22] The district court found for the Government on the latter two charges.[23] Both parties appealed. The Government appealed the dismissal of the Section 2 charges, and the defendant appealed the court's finding violation of Section 3 of the Sherman Act and Section 7 of the Clayton Act.[24]

The Supreme Court unanimously reversed the district court on dismissing the Section 2 charges and affirmed its holding on the Section 3 and Section 7 charges. The Court held that the same contentions had been rejected in the *Borden* case[25] as to Section 1 of the Sherman Act, and that Congress did not intend to immunize under Section 2 of the Sherman Act practices which would be violations under Sections 1 and 3 of the Sherman Act. The Court emphasized that the Capper-Volstead Act had immunized associations of farmers to carry out "the legitimate objects" of an association, that such legitimate objects did not include "preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." [26]

The Supreme Court also considered the defense raised as to the Section 7 of the Clayton Act allegation, that the acquisition by the Association of Embassy Dairy was protected by the last paragraph in that section which provides:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by . . . the Sec-

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21 *Ibid.*

22 The district court distinguished these allegations from the Sherman Section 2 charge on the basis that the Sherman Section 3 and Clayton Section 7 charges involved activities with persons who were not cooperatives covered by the Capper-Volstead Act. *Id.* at 801.

23 *Id.* at 809; 168 F. Supp. 880, 882.

24 *Maryland and Virginia Milk Producers Assoc., Inc.* v. *United States, United States* v. *Maryland and Virginia Milk Producers Assoc., Inc.,* 362 U. S. 458 (1960).

25 *United States* v. *Borden,* 308 U. S. 188, 206 (1939).

26 See note 24 *supra,* at p. 467.

> retary of Agriculture under any statutory provision vesting such power in such . . . Secretary . . .

The court found that:

> . . . The trouble with this contention is that there is no 'statutory provision' that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case.[27]

II.

Clayton Act Litigation

Since July, 1959 there have been three district court decisions as to Section 7 cases brought by the Department of Justice, (1) *United States* v. *Brown Shoe Corporation, et al.,* which is now on appeal from Judge Weber's decision that Brown's acquisition of Kinney violates the statute,[28] (2) *United States* v. *Columbia Pictures Corp., et al.,*[29] which was decided against the Government in the Southern District of New York and will not be appealed, and (3) *United States* v. *Jerrold Electronics Corporation,*[30] which reached an inconclusive result on the question whether Jerrold's acquisitions violate Section 7 of the Clayton Act and to date neither party has filed a notice of appeal.

(a) *Jerrold Electronics*

The *Jerrold Electronics* opinion is in some respects the most provocative of the opinions rendered in the three cases for reasons which I will attempt to state.

First, the district court reached the following conclusions of law:

> 10. The effect of each of the acquisitions by the defendant Jerrold of community television antenna systems and the cumu-

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[27] *Id.* at pp. 469-70.

[28] 179 F. Supp. 721 (E. D. Mo., 1959), *prob. juris. noted,* 363 U. S. 825 (1960).

[29] This case was also considered in the prior discussion on the Sherman Act. *Supra,* pp. 6-10.

[30] 1960 Trade Cases, Par. 69,784 (E. D. Pa., July 25, 1960).

lative effect of the entire series of said acquisitions is to foreclose competitors of the defendants from a share of the market in community television antenna system equipment. The effect of any future acquisitions may be to substantially lessen competition and to tend to create a monopoly in the sale and distribution of said equipment in various sections of the United States in violation of §7 of the Clayton Act (15 U. S. C. A. §18).

11. The line of commerce affected in the violation by defendants of Section 7 of the Clayton Act in the total demand throughout the United States for community television antenna equipment.[31]

Taken together, it seems that these Conclusions of Law would support either of two contradictory holdings. First, from these Conclusions of Law it appears that the district court held that each of the acquisitions and the cumulative effect of the entire series of acquisitions substantially lessened competition and, therefore, were in violation of Section 7. But from the same Conclusions of Law it can be argued that the effects of the acquisitions, separately and combined, did not violate the Act but came sufficiently close to doing so that any future acquisition of whatever type would result in a violation.

In examining the court's opinion for aid or guidance in interpreting its Conclusions of Law on the Section 7 charges in the case[32] the court states that "the evidence presented in this case is not of such a quality that it can fairly say that any one of Jerrold's acquisitions to date, combined with the ones before it, foreclosed a sufficient portion of the market so that there is a reasonable probability that the condemned effects will occur." The Court also states that "Jerrold's acquisitions are approaching, if not beyond, the point where it can be said that it is a reasonable probability that they will have the prohibited effects when they are examined in the context of Jerrold's prominent position in the industry." [33]

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[31] *Id.* at p. 77,107.

[32] Violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act were also alleged with the district court finding for the Government on these charges as well. *Id.* at p. 77,092.

[33] *Id.* at pp. 77,106-7.

These statements of the court leave uncertain whether the court found that each of the Jerrold acquisitions and the cumulative effect of the entire series of such acquisitions violated Section 7, or whether such acquisitions, considered separately or combined, came to the brink of doing so and that any future acquisition of whatever magnitude would result in effects proscribed by the Act.

In any event, the court held that the plaintiff is entitled to the injunctive relief it seeks as to any future acquisitions for a three-year period. In so doing, the district court applied a new standard of relief in Section 7 cases.[34]

(b) *Screen Gems*

The *Screen Gems* opinion, previously discussed, also decided the question whether Screen Gems' acquisition of the right to license Universal Pictures violated Section 7.

The court found that the rights acquired had substantial economic value and were "assets" within the meaning of Section 7 in spite of the fact that Universal retained certain valuable rights with respect to the films involved.[35]

On the line of commerce issue, the Government contended that feature film for exhibition on television was an appropriate line of commerce within which to test the competitive effect of the acquisition, arguing that feature films have obvious peculiar characteristics and uses as the phrase is used in the *du Pont-General Motors* case.[36] For example, the distinctions between Leonard Bernstein on "Omnibus" and Dracula on "The Late Show" are readily apparent. Among these peculiar characteristics and uses were asserted to be: (1) feature films are recognized by the television viewing public as a separate category of television entertainment, (2) feature films by reason of their length are distinguishable from most other television programming material, (3) the cost of feature film is less than for other television programming material, (4) feature films enable television stations to maintain variety in programming, (5) feature films are less adaptable to sport advertising and (6) feature films are treated

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34 *Id.* at p. 77,107.

35 See note 6 *supra*, at pp. 77,066-7.

36 *United States* v. *E. I. du Pont de Nemours and Company, et al.*, 353 U. S. 586 (1957).

as a separate and distinct product by the television stations, trade publications, newspapers and periodicals, and producers and distributors of television programming material, including the defendants.[37] The Government also referred to the Supreme Court's decision in the *Paramount* case where first run feature films were the part of trade or commerce monopolized.[38]

The district court, applying the market test set forth by the Supreme Court in the *du Pont* (*Cellophane*) case,[39] held that the record did not support these distinctions alleged by the Government. It concluded that the appropriate line of commerce in the case was not feature films for exhibition on television, as contended by the Government, but all television programming material.[40] The court stated that "the test 'reasonable interchangeability for the purposes for which (the products) are produced—price, use and qualities considered' (citing the *du Pont* (*Cellophane*) case) and the test 'sufficient peculiar characteristics and uses to constitute them products within the meaning of the Clayton Act' are but different verbalizations of the same criteria," that "they require the same accumulation and scrutiny of facts and application of judgment." [41]

Whatever may be said for the district court's Findings of Fact, equating the test set forth in the *Cellophane* case for Sherman Section 2 violations and the test set forth in the *du Pont-General Motors* case for Section 7 violations and applying the *Cellophane* test of interchangeability and substitutibility to a line of commerce determination appears to be error.

It is opposed to the views of Judge Weinfeld, sitting in the same court, who stated in the *Bethlehem Steel* case[42] that:

> . . . It should be noted that the basic issue in the Cellophane case was that of monopoly power and the Supreme Court expressly limited the market definition there to the monopolization clause of §2 of the Sherman Act. There is a basic distinction

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37 See note 6 *supra*, at p. 77,009.

38 *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

39 *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

40 See note 6 *supra*, at p. 77,014.

41 *Id.* at pp. 77,007-8.

42 *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593 (S. D. N. Y., 1958).

> between §2 of the Sherman Act and §7 of the Clayton Act. Further, monopoly power was defined by the Supreme Court in the Cellophane case as "the power to control prices or exclude competition." Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition. . . .

This holding of the district court in the *Bethlehem Steel* case was endorsed by Judge Weber in another recent Section 7 case, the *Brown Shoe* case, when he stated that "[t]he earlier *du Pont* (*Cellophane*) case has been distinguished and limited as applying to the monopolization clause of Section 2 of the Sherman Act." [43]

The Cellophane test of reasonable interchangeability, according to the Supreme Court opinion in that case, was concerned with the question whether an alleged monopolist has monopoly power over a "part of trade or commerce," and not whether Cellophane was a "part of trade or commerce" as the words are used in Section 2 of the Sherman Act.[44] This is clear from a majority opinion of the Supreme Court in the *Cellophane* case. The defendant du Pont conceded the fact that cellophane is a monopolizable part of trade or commerce.[45] The issue in that case was whether du Pont had monopoly power over cellophane. The evidence of substitute products and product interchangeability was directed entirely to that issue. The Supreme Court concluded that because du Pont could not raise the price of cellophane without substantial shifts by consumers to other products, du Pont did not have the power over price which was necessary to a conclusion that it had unlawful monopoly power.[46]

This type of analysis, which is highly relevant in a monopoly case, has no relevance in a Clayton Act case except, perhaps, as it may show a tendency to monopoly. An acquiring company may obtain by

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[43] See note 28 *supra*, at 730.

[44] See note 39 *supra*, at 380.

[45] *Ibid.*

[46] *Id.* at 403.

its acquisition a greater degree of power over price than before the acquisition. The increment in its power to affect price would be relevant to proof of a tendency to monopoly, although the additional power to affect price obtained through acquisition could well fall short of that required to establish a Section 2 Sherman Act violation.

In the *Screen Gems* case, the Government did not allege a tendency to monopoly. It alleged that the effect of the acquisition may be substantially to lessen competition.

However, even if a tendency to monopoly had been alleged, the Supreme Court opinion in *du Pont-General Motors* establishes the fact that this tendency need not be established solely by a showing of degrees of cross-electicity of demand but may also be established by a showing of foreclosure from substantial markets or actual exclusion of competition.

By the enactment of Section 7 of the Clayton Act, it was Congress' intention, as ascertained by the committee reports and legislative debates,[47] to protect competition by preventing mergers, which may eliminate competitive activity to a substantial degree in "any line of commerce," whether the area of competitive activity is in a narrow line of physically identical products, which may or may not have substitutes, or whether the area of competitive activity is between products which are not physically identical but interchangeable for some purposes. A finding that there are products interchangeable with these as to which competition has been eliminated, that people who watch "The Late Show" may also watch "Playhouse 90," hardly ends the inquiry.

But the issue was whether the competition, which was undeniably eliminated, was substantial in the line of commerce. The dollar amount of the competition eliminated does not, of course, change because other products may compete with those as to which competition is eliminated. The game is, of course, in a Section 7 action from the defendants' point of view to arrive at percentage figures by using some line of commerce which can be claimed to be insubstantial. The percentage figures in the line of commerce claimed

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[47] *E.g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess. (1949); Sen. Rep. No. 1775, 81st Cong., 1st Sess. (1949).

by the Government in the *Screen Gems* case were between 8% and 16% for the years in question.[48]

(c) *Brown Shoe*

The Supreme Court has noted probable jurisdiction of the *Brown Shoe* case and, at the same time, denied a motion by the Government to affirm the district court's decision.[49] In its Motion to Affirm the Government had urged that although a definitive statement by the Court on amended Section 7 would be helpful in enforcement, no significant legal issue was presented in isolation from attack on the district court's Findings of Fact.[50] The prospect is now that the Supreme Court's decision of this case will establish important guideposts for future Section 7 litigation.

Since this case is now on appeal, I am foregoing any extended discussion of the district court's opinion. It may be noted, however, that this case may be characterized as a "broad line" case as to the lines of commerce found, *i.e.*, men's, women's and children's shoes, considered separately. These lines of commerce encompassed shoes of various styles and prices. Another interesting aspect of this case is the rather heavy reliance by Judge Weber on the testimony of industry witnesses for finding that the acquisition involved would result in anticompetitive effects in violation of Section 7.

III.

Relief in Clayton Act Section 7 Cases

With a number of Section 7 cases reaching the conclusion that acquisitions or mergers result in a violation of the Act, an important question has arisen as to what constitutes appropriate relief in such cases.

Regarding this question, Section 11 of the Clayton Act provides:

> . . . If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of

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[48] See note 6 *supra*, at p. 77,018.

[49] See note 28 *supra*.

[50] See Brief of the United States, *United States* v. *Brown Shoe Corp.*, Supreme Court Case No. 829, p. 7.

> said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order *requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held* or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. . . . (Emphasis supplied.)

The Department of Justice has taken the position that when a district court is exercising the jurisdiction given it by Section 15 of the Act to "prevent and restrain" violations of Section 7, in a proceeding by the United States, its statutory duty is equally to terminate the holding of the stock or assets unlawfully acquired.

This position of the Government was made clear in its Notice of Appeal to the Supreme Court of Judge La Buy's decision regarding the judgment to be entered in the *du Pont-General Motors* case[51] permitting defendant du Pont to retain its 23% stock interest in General Motors with certain restrictions imposed on the voting of the stock and other injunctive provisions pertaining to the relationships existing between the defendants. In the subsequent Jurisdictional Statement filed with the Supreme Court, the Solicitor General reiterated the Government's position that violation of Section 7 of the Clayton Act requires divestment of the illegally held stock whether the action is brought by the Federal Trade Commission or the Attorney General.[52]

During the past year two district courts, in finding a violation of Section 7, have provided for divestiture of the unlawfully acquired assets or stock in the judgment entered.

The final judgment in the *Brown Shoe* case, which was brought under Section 15 of the Clayton Act and now on appeal, provides ". . . defendant Brown is ordered to relinquish and dispose of the stock, share capital and assets of defendant G. R. Kinney Corpo-

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[51] See Notice of Appeal filed in *United States* v. *E. I. du Pont de Nemours, et al.*, Civ. No. 49 C 1071 (N. D. Ill., 1959).

[52] Jurisdictional Statement, *United States* v. *E. I. du Pont de Nemours, et al.*, Supreme Court Case No. 781, pp. 8-10.

ration, and any stock, share capital, assets or other interest it may have, in defendant G. R. Kinney Co., Inc." [53]

Judge Holtzoff in the *Maryland and Virginia Milk Producers* case, previously discussed, required that the cooperative divest itself within a reasonable time of all assets acquired from Embassy Dairy and to cancel all contracts ancillary to the acquisition.[54] In the appeal to the Supreme Court, Judge Holtzoff was sustained in this order.[55]

The *Jerrold Electronics* case perhaps represents a case in which divestiture was not ordered of the unlawfully acquired assets. But as discussed previously the court in that case appears to have held that none of the past acquisitions had violated the Act.[56]

In reviewing all of the judgments entered by consent in Section 7 cases during this past year, in each case divestiture was ordered of the assets which were alleged to have been acquired in violation of that Act.

The final judgment entered in *United States* v. *Anheuser-Busch, Inc.,*[57] entered by consent provides:

> Defendant Anheuser shall, subject to the terms of this Final Judgment, divest itself of all of the Miami Brewery of American, and of all additional assets or improvements which have been added to said brewery since its acquisition by Anheuser, in its possession.

Similarly, in *United States* v. *Hertz,*[58] the final judgment by consent requires Hertz to sell "to an Eligible Person" (as defined in the judgment) all of the assets of the Couture Rent A Car System, or their substantial equivalent, and the assets of a New York City truck leasing and renting business. The Couture System in Florida was one of the companies, which the Government alleged had been unlawfully acquired by Hertz, and the New York truck leasing and

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[53] *United States* v. *Brown Shoe, et al.,* Civ. No. 10527 (E. D. Mo., 1959).

[54] See note 20 *supra.*

[55] See note 24 *supra.*

[56] *Supra,* pp. 15-17.

[57] *United States* v. *Anheuser-Busch, Inc., et al.,* 1960 Trade Cases, Par. 69,599 (S. D. Fla., January 11, 1960).

[58] *United States* v. *The Hertz Corporation,* 1960 Trade Cases, Par. 69,762 (S. D. N. Y., June 29, 1960).

renting business to be divested, represent the substantial equivalent of assets allegedly unlawfully acquired in New York.[59]

United States v. *Gamble-Skogmo, Inc., et al.,*[60] was filed in the Western District of Missouri on April 1, 1960 attacking Gamble-Skogmo's and Bertin C. Gamble's 46% stock interest in its competitor, Western Auto. After the suit was filed, the Western Auto stock involved was sold to Beneficial Finance Co., a purchaser approved prior to the sale by the Government. On July 18, 1960 after complete divestiture by Gamble-Skogmo had been assured, a consent judgment was entered terminating the case.[61]

IV.

Questions Which Have Arisen in Selected Pending Clayton Act Cases

(a) *Continental Can and Owens-Illinois*

Two pending Antitrust Division cases will be interesting to watch in that they raise the issue squarely as to whether there is only one "appropriate" line of commerce within a particular industry, or whether there may be more than one depending on the facts of the particular case as they relate to the specific acquisition involved.

In the *Continental Can* case,[62] competition alleged to be eliminated by the merger includes that existing between can and glass containers. The merger thus allegedly affects lines of commerce including food and beverage containers.

The Government contends that not only does the merger adversely affect competition in the broad container line by eliminating existing competition, but that in the included lines of can and glass containers,

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59 1959 Trade Cases, Par. 45,059 (Case 1444) (S. D. N. Y., May 1, 1959).

60 See note 23 *supra*.

61 1960 Trade Cases, Par. 69,770 (W. D. Mo., July 18, 1960).

Subsequent to the delivery of this paper, on September 24, 1960, a consent judgment was entered, terminating the *American Standard* case, which provided for divestiture of the assets of Mullins Manufacturing Corp., the company alleged to have been acquired in violation of Section 7. *United States* v. *American Radiator & Standard Sanitary Corp.,* Civ. No. 14469 (W. D. Pa.).

62 *United States* v. *Continental Can Company, Inc., and Hazel-Atlas Glass Co.,* Civ. 112-387 (S. D. N. Y.).

respectively, the combination of the two companies will give them an advantage over their smaller competitors which may be decisive. Thus, the Government contends that the addition of Hazel-Atlas' business to Continental Can's will adversely affect companies engaged solely in the line of commerce comprised of the manufacture, distribution and sale of cans and that the addition of Continental's market power to Hazel-Atlas' business resources will adversely affect companies engaged solely in the line of commerce consisting of the manufacture, distribution and sale of glass containers.

The defendants contend that cans and glass containers are in separate, non-competitive lines of commerce and, therefore, the merger has no substantial effect on competition.

In the *Owens-Illinois* case[63] the Government alleges that Owens' acquisition of the National Container Company, a shipping container manufacturer, will have substantial anti-competitive effects on the line of commerce comprised of glass containers. It contends that the fact that cans are interchangeable with glass containers for many purposes is irrelevant since competition between cans and glass containers is not at issue in the *Owens* case.

The defendant may argue that even if competition in the glass container industry is affected by the acquisition of National Container, the effect is insubstantial due to existing competition from cans.

Thus, the question arises whether Congress intended to preserve competition in the glass container industry, or whether so long as some competition is left from cans or other containers, which may be substitutable in all or some degree, substantial adverse affects or complete elimination of competition in the glass container industry alone may be disregarded if it is a minor part of the competition existing in the container industry as a whole.

(b) *Firstamerica*

During the year, the Federal Reserve Board approved under the Bank Holding Company Act a stock acquisition which was later attacked by the Department of Justice in a Section 7 Clayton Act proceeding. In the *Firstamerica* case[64] the Government charged

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[63] *United States* v. *Owens-Illinois Glass Co.*, Civ. 7686 (N. D. Ohio).

[64] *United States* v. *Firstamerica Corp.*, 1960 Trade Cases, Par. 45,059 (Case 1443) (N. D. Calif., March 30, 1959).

that the acquisition by Firstamerica Corporation of the stock of California Bank of Los Angeles violated Section 1 of the Sherman Act and Section 7 of the Clayton Act. It alleged that, if consummated, the merger would give the resulting bank approximately 16% of banking offices in Los Angeles and 11% of banking offices in the State of California. Within the eleven-state Western area, the merger would give Firstamerica 387 banking offices and deposits of approximately $4,000,000,000.

Firstamerica moved to dismiss the complaint on the ground that the action of the Federal Reserve Board in approving a bank stock acquisition under the Bank Holding Company Act of 1956 barred a subsequent civil antitrust suit by the United States. The Board had considered the competitive factor to be the conclusive one in its determination and, nevertheless, approved the transaction. The Board also expressed the "opinion" that the acquisition would not "lessen competition substantially or tend to create a monopoly within the meaning of Section 7 of the Clayton Act."

Since there was no Section 7 issue before the Board, the Government contended that this "opinion" was dictum. The Government argued that the Bank Holding Company Act did not empower the Board in proceedings under that Act to determine Section 7 issues, that such issues could be decided by the Board only in a proceeding instituted under Section 11 of the Clayton Act with notice to the Attorney General.

The district court denied the defendant's motion to dismiss the complaint.[65] The Supreme Court declined to grant the defendant's motion for leave to file a petition for a writ of certiorari.[66]

(c) *Retention of the Selling or Acquired Company as a Party in Section 7 Cases*

Section 15 of the Clayton Act provides in part that ". . . whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned. . . ."

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65 *Ibid.* (motion denied without opinion).

66 Cert. denied, 361 U. S. 928 (1960).

Relying primarily on this provision in the statute, the Government in several cases has named the seller or acquired company as a defendant in Section 7 cases.

In four cases, the defendants, consisting of the selling or the acquired company, have moved to dismiss the action as to them relying primarily on the language of Section 7 itself to the effect "that no corporation engaged in commerce shall acquire . . . " and in which no mention is made as to the selling or acquired company.

In the *Pabst-Blatz*[67] merger case, Judge Tehan in the Eastern District of Wisconsin denied such motions to dismiss by Schenley Industries, Inc. and The Val Corporation.

Pabst-Blatz and Schenley had entered into an agreement of sale on or about July 30, 1958 under which Pabst purchased the assets and business of Blatz for $11,000,000 in cash, $3,500,000 in debentures, 200,000 share of Pabst common stock and a stock purchase warrant for 350,000 shares of Pabst common stock. After the sale, Blatz changed its name to The Val Corporation and was dissolved under the laws of Wisconsin on or about September 2, 1958.

The district court denied the Motions to Dismiss of Val and Schenley who asserted that since they had been charged with no violation of the law they were not proper parties. Judge Tehan, relying on the *du Pont-General Motors* decision on relief,[68] decided that the court had authority to grant relief not only against parties, found to have violated the statute, but also against other parties if such relief is necessary to eliminate the effects of an acquisition offensive to the statute. The court also referred to the fact that neither moving party was a stranger to the transaction since both were parties to the agreement of sale. He found, moreover, that both had proceeded to a consummation of the sale with full knowledge that the Antitrust Division of the Department of Justice proposed to make a study of whether the transaction involved any violation of the antitrust laws. Furthermore, the court stated that Schenley continues to hold stock and stock purchase warrants of Pabst, which were part

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67 *United States* v. *Pabst Brewing Company, et al.*, 1960 Trade Cases, Par. 45,059 (Case 1479) (E. D. Wisc., October 1, 1959).

68 Judge La Buy denied a Motion to Dismiss by defendant General Motors on the same grounds. *United States* v. *E. I. du Pont de Nemours & Co.*, 117 F. Supp. 1 (N. D. Ill., 1959).

of the consideration for sale, and relief against them might be appropriate because of their close connection with the transaction.[69]

Judge Tehan's opinion followed an earlier decision by Judge Martin, sitting in the Southern District of Florida, denying the motion of defendants, who were also selling companies, to dismiss in *United States* v. *Anheuser-Busch.*[70]

In the *Gamble-Skogmo* case, previously referred to, Gamble-Skogmo had acquired a controlling stock interest in its competitor, Western Auto, from third party stockholders of Western Auto. Western Auto claimed that it did not participate in any manner in the transactions resulting in the acquisition of its stock by Gamble-Skogmo. Based primarily upon these grounds, Western Auto argued that it was not a property party to a Section 7 action, attacking this acquisition, and moved to dismiss itself as a party defendant to this allegation in the Complaint. In an unreported opinion, the district court denied the motion.[71]

A district court, however, in a recent Section 7 case reached a contrary result. In the *Maremont Automotive Products* case, the complaint charged that Maremont, the acquiring company, had violated Section 7 in acquiring stock control of Saco-Lowell, naming it as defendant, for the purpose of eliminating the competition of the latter in the sale of automotive exhaust system parts throughout the United States. Defendant Maremont moved for a dismissal on the grounds that there was no proceeding pending in Maine, where Saco-Lowell was located and the action was filed, which could afford the basis for extra-territorial service upon Maremont in Chicago, Illinois under Section 15 of the Clayton Act. The court granted Maremont's motion to dismiss and distinguished the above prior cases on the grounds that in those cases "it was charged that the acquired corporation was actively participating in the alleged violation by the sale of either assets or of stock." [72]

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69 1960 Trade Cases, Par. 69,700 (E. D. Wisc., April 7, 1960).

70 Unreported opinion. 1960 Trade Cases, Par. 45,058 (Case 1421) (S. D. Fla., October 30, 1958). The final judgment in the *Anheuser-Busch* case ordering divestiture of the acquired brewery also required City Products to give notice to the Government of the sale of any other of its breweries. 1960 Trade Cases, Par. 69,599 (S. D. Fla., Jan. 11, 1960).

71 See note 3 *supra.*

72 Unreported opinion. *United States* v. *Maremont Automotive Products, Inc., et al.,* Civ. No. 6-109 (D. Me.).

Thus, at the present time, there appears to be a split in the decisions of the district courts as to whether a selling or acquired corporation in a Section 7 proceeding is a proper party defendant to the action with the majority of courts taking the position that it is a proper party. All courts, however, appear to be in agreement that it is a proper party if the acquired or selling corporation actively participates in the transaction resulting in the sale or transfer of the assets or stock alleged to be illegal.

Conclusion

In conclusion, it seems that the antitrust laws have continued to develop during the past year in such a fashion that full employment for both Government attorneys and defense counsel is assured.

DEVELOPMENTS UNDER THE ROBINSON-PATMAN ACT

by

JOHN T. LOUGHLIN*

This paper is a report of significant developments during the past year under the Robinson-Patman amendment of the Clayton Act, including cases in the courts, cases before the Federal Trade Commission, administrative and procedural developments, and legislation, with a brief look at the future.

I. LITIGATION

There were two Supreme Court decisions under the Robinson-Patman Act, but I shall first discuss a District Court decision. It is the judgment of the United States District Court of the District of Columbia on July 1, 1960 in the case of *Nash-Finch* v. *FTC*, Civil No. 2612-59, holding, in effect, that FTC cannot legislate, at least by press release.

On July 23, 1959, with the signature of the President, Public Law 86-107 became effective. This legislation, sought for more than 20 years by the Federal Trade Commission, automatically makes final cease and desist orders under the Clayton Act in the absence of appeal within 60 days after service. It provides penalties of up to $5,000 for each violation of an FTC cease and desist order. In the case of a continuing violation, each day may be deemed a separate offense.

FTC had sought a retrospective provision applying not only to new orders but also to the several hundred Clayton Act cease and desist orders issued from 1914 to 1959. FTC-sponsored legislation specifically included such old orders in its ambit by providing that as to such old orders the 60-day appeal period would begin on the date of enactment. This retrospective approach was rejected by the Congress; and it was the accepted view that the impact of the new legislation was prospective only. The House Judiciary Committee reported: "Section 2 provides that the amendment made in Section 1

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shall not apply to any proceeding initiated before the date of enactment."

Five days after the President signed the Bill, FTC issued a press release stating that the new law applied not only to future orders but also to the many old cease and desist orders. The FTC press release provided a period of 60 days to appeal old orders. FTC's position, according to its staff, was based upon the view that if the new law did not apply, the old orders would be unenforceable. However, legislation enacted many years ago provides for the continuance of previous sanctions in such situations. The decision of the Federal District Court consequently invalidated the FTC position, and the many old R-P orders remain unaffected by the new legislation. The decision is, of course, subject to appeal.

In its most recent decision under the Robinson-Patman Act, the Supreme Court reversed the decision of the Court of Appeals for the Seventh Circuit in the matter of *FTC* v. *Anheuser-Busch, Inc.* The Supreme Court held that "price discrimination" within the meaning of Subsection 2(a) of the Robinson-Patman Act, means no more than "price difference." Intent and other matters were held to be irrelevant to the issue of discrimination, although they are or may be relevant to the issue of injury to competition and to the defenses.

The Supreme Court decision in this case is not a final disposition of the case; it merely shifts the action from the issue of discrimination to the issues of injury to competition and good faith meeting of competition. The case has been remanded to the Court of Appeals for this Circuit for further proceedings under the defenses.

On June 6, the Supreme Court reversed another decision of the Seventh Circuit in the matter of *FTC* v. *Henry Broch and Company.* This case was brought by the Federal Trade Commission under Subsection 2(c), the brokerage section. The Supreme Court held that a seller's broker, who normally received a brokerage commission of 5%, violated 2(c) by accepting a reduced commission of 3% on a particular transaction in which the ultimate buyer received a price lower than the original offer.

In some respects, the *Broch* proceeding seems somewhat inconsistent with a 1955 proceeding brought by FTC against the National Food Brokers Association, charging a conspiracy to eliminate competition. Under the *Broch* decision, a chief avenue of competition, that of price, is limited seriously in individual transactions. This

decision abridges the right of a broker to price his services according to time and cost factors which may vary among transactions. He must charge the seller a flat rate.

It is important to note in this type of brokerage proceeding that not only is the broker vulnerable; the seller in the transaction might also have been charged by FTC with passing on part of the brokerage to the buyer. A pending 2(c) case against Thomasville Chair Company (Docket 7273; note FTC hearing examiner's dismissal on September 12, 1960) charges that a reduction in brokerage is passed on to large volume accounts. Also, if the buyer knows that his lower price reflected part of the brokerage, he, too, may be charged by FTC as being within the interdiction of Subsection 2(c).

What appears to be a "golden egg" for the broker group in the *Broch* case may be only a short term benefit. We have already seen since this decision a movement by sellers toward elimination of brokers and toward direct dealing with *customers,* thus avoiding entirely the use of brokers. Is this not an inevitable reaction under the *Broch* case and the many brokerage cases filed before and since by the Federal Trade Commission?

On July 22, 1960, in the case of *FTC* v. *Washington Fish & Oyster Company,* the Court of Appeals for the Ninth Circuit again confirmed FTC's position that the good faith meeting of competition defense was not available under 2(c).

The case of *FTC* v. *Whitney and Company,* also in the Ninth Circuit, demonstrates the difficulty of complying with an order to cease and desist issued under the brokerage section. In this case, Whitney was held guilty of criminal contempt for a single transaction involving 810 cases of canned salmon purchased from American Packing Company.

The decision was rendered on November 18, 1959. The transaction complained of took place in June of 1956, at which time Whitney undertook to act as a seller's broker for American in connection with the sale of 810 cases of canned salmon. Whitney hoped to sell this salmon at a price of $15 per case, and for this service Whitney was to receive 5% commission or a total of 75 cents. However, Whitney was unable to sell the salmon at the agreed upon price of $15. Failing to dispose of the salmon as a broker, Whitney nonetheless took it off the hands of American, taking title at a net return to American of $14.25, which is $15 less 5%, the same price which

would have been received by American under the brokerage arrangement. Thereafter, Whitney resold the salmon at a price of $14.50, leaving a return to itself of 25 cents a case. The service rendered by Whitney cannot be questioned, and yet for rendering this service for 25 cents instead of 75 cents, what seems almost a harmless, technical violation, Whitney was found to be in criminal contempt.

If the seller dealing through brokers is prohibited from obtaining service at competitive prices based on the cost and value of the service and from meeting competitive prices of other suppliers, his logical recourse is to avoid brokers entirely. This is the seller's privilege. In another brokerage case, a private case, *Albert E. Robinson* v. *Stanley Home Products, Inc.,* the United States District Court for the District of Massachusetts held that it is not a violation of Subsection 2(c) to discontinue use of a broker and to pass on the savings thus made to the buyer. This decision was affirmed last December by the United States Court of Appeals for the First Circuit.

The net result of the brokerage hassle may be many large suppliers selling directly to large buyers, without brokers at law prices reflecting the brokerage savings, while many small buyers continue to buy through brokers at higher prices. What has been gained? The little fellows pay higher prices and the brokers will have lost the business of large buyers.

The impact on the large buyer is minimal. His options include (1) buying from packers who use no brokers; (2) buying the entire output of a packer; (3) integrating backward through purchase or establishment of his own source of supply.

A third Supreme Court decision, just prior to the year which we are discussing, was in the 1959 case of *FTC* v. *Simplicity Pattern Co.* In *Simplicity,* the Supreme Court affirmed the position of the Federal Trade Commission that the cost justification defense and the absence of competitive injury were not relevant to a proceeding of the Subsection 2(e) of the Robinson-Patman Act.

This decision continues the compartmenting which has been characteristic of the enforcement of the Robinson-Patman statute from the beginning. *Simplicity* affirmed FTC's position that each subsection of the statute is a separate and distinct type of violation with its own individual criteria.

The *Simplicity* decision also contains some language suggesting that consignment may be a service under Subsection 2(e), although

consignment had been disposed of in FTC's dismissal of Count I of the complaint. On the affirmative side, the decision may be helpful to counsel in future cases in suggesting that the Court looked kindly upon the unused defense of proportional availability.

In another interesting case, *Secator's, Inc.* v. *Esso-Standard Oil Co.,* the District Court of the District of Massachusetts held that it is not price discrimination to sell to an ultimate user at a lower price than that which is available to a retailer; also that it is not a violation of the Robinson-Patman Act to impose or to refuse different terms of credit.

In *George W. Warner & Co.* v. *Black & Decker,* the United States District Court for the Eastern District of New York held that it is not a violation of Robinson-Patman to refuse to sell a commodity or to charge different prices for the repair of tools. There must be a sale of a commodity at two prices. The statute does not apply to discriminatory sales of services, other than brokerage service.

By letter of August 16, 1960 we were informed by the Administrative Office of the United States Courts that during the fiscal year concluded on June 30, a total of 228 private antitrust suits were initiated, which is about the average for the last 10 years. Examining the records available at the Administrative Office in Washington, Chester R. Davis, Jr. of our firm was able to pinpoint about 35 cases alleging violation of the Robinson-Patman Act.

The industry appearing most frequently in the private complaints was the oil industry, with the roofing industry following closely. A surprisingly large number of the cases appear to represent fallout from activities of the Federal Trade Commission—there being a case against Simplicity Pattern Company alleging favored treatment of larger customers and a case by Curtis Brothers of Washington, D. C. against Thomasville Chair Company, currently engaged in 2(c) litigation before the FTC. The roofing and oil industry cases appear to flow from congressional investigations as well as from recent FTC complaints. Other significant private cases were filed in the dairy industry where FTC has also been active.

In magnitude of amounts awarded or sought, last year's crop of private cases shows nothing to compare with the Bruces Juices award of 10 years ago or with the baby food litigation which has been underway for some years involving claims and counterclaims for

$150,000,000. The latest step in this litigation, a denial of motion for summary judgment, was reported in February.

The largest claim filed in the past year was for $3,300,000. There was one suit for $2,000,000 against a Chicago-based national food chain organization. Some of the claims for damages appear to be quite modest. For example, the Kelly-Ostrow suit against Simplicity Pattern Company filed on January 15, 1960, asked only $3,000. Other suits involved claims of $10,000 and $15,000 and there was another for $12,000.

Private litigation significant in the Chicago area continues in the matter of *State Wholesale Grocers et al.* v. *A&P,* remanded for findings on the issue of damages.

By way of conclusion as to the private Robinson-Patman cases filed, pending and concluded in the Federal District Courts, it may be said that during the past year many of the cases flowed from FTC actions and there has been no significant award of damages for violation of the Robinson-Patman Act. This is not to say that cases have not been settled by the payment of various sums, but these have mostly been nuisance value dispositions.

The stumbling block in private cases has consistently been proof of damages. The courts have been reluctant to impose financial penalties for acts of competition, in the absence of a showing of clear violation and direct, substantial injury.

II. Proceedings at FTC

The courts have not shown the same questioning attitude on injury prior to affirming the slap on the wrist in the form of FTC orders. FTC's pronouncements on possibility or probability of injury are almost universally upheld. We are thus faced with dual standards of injury. In private cases, proof is required; in FTC proceedings, "educated suspicion" is held sufficient in those cases where the defense applies. Under 2(c), 2(d), and 2(e), not even that is required. This "easy" burden of proof is one of the factors behind FTC's statistical skyrocket. Even in an election year, the Robinson-Patman case record of the Federal Trade Commission is amazing.

Mr. Kintner has stated that 130 complaints were filed by FTC during the past year. This is 6 times the annual average from 1936 to 1956. In a letter of September 9, 1960, the Commission supplied

statistics as to pending cases in its Bureau of Litigation. In the following table, these are compared to the figures obtained for a paper in May of 1959:

Pending Cases	*1960*		*1959*
Price discrimination under 2(a)	74		29
Brokerage under 2(c)	63		9
Promotional payments under 2(d)	50		26
Promotional services under 2(e)	5		1
Knowing inducement under 2(f)	9		4
	201	Total pending caseload	69

The pending litigation caseload rise from 69 to 201 is not entirely due to Chairman Kintner's Robinson-Patman crusade. The new finality legislation also seems to be having an impact, particularly under 2(a). Statistics in April of 1959 revealed that approximately 83% of Robinson-Patman cases were being settled by consent at that time. With up to $5,000 riding on each invoice, since July 23, 1959, contest is more inviting.

What types of cases are being brought by FTC? As in the past, many new cases are against relatively small factors in the brokerage field under Subsection 2(c); however, there has been a resurgence of activity under Subsections 2(d), 2(e), and 2(f). 2(d) has provided a very lush field for complaints. Two complaints were issued this year by FTC against grocery chains charging them with knowingly inducing advertising allowances from 90 and 75 suppliers respectively. To this point, 18 of the 165 suppliers have been charged in separate complaints with violation of 2(d), and more such complaints are probably in the offing. Two of the 2(d) respondents are charged with making payments of sums as small as $106 and $150. Ironically, the situation finds FTC a victim of its own "eager beavering" in *Simplicity* and earlier cases which decreed the unconditional divorce of Subsections 2(c), 2(d), and 2(e) from 2(a) and consequently 2(f). The suits against the two grocery chains are brought not under 2(f) of Robinson-Patman, but under Section 5

of the FTC Act, described by Commissioner Tait in his dissent in the *Grand Union* case (Docket 6973, August 1960) as attempted legislation.

Under 2(a), quantity discounts have come under the first concerted onslaught since the enactment of the Robinson-Patman statute in 1956. The sliding scale, once considered a constructive, equitable approach, has come under attack, and has been found very difficult to cost justify in all gradations.

Many interesting issues have arisen in the complaints, and not the least interesting is one involving a local company. Are price concessions from a controlled supplier subject to the statute? This question will be answered in a proceeding involving Sears Roebuck & Co. brought by the Commission some weeks ago. The supplier is charged under 2(a); Sears under 2(f).

Commoditywise, the new cases have covered just about everything needed by the little lady to equip herself and run the home: Hats, hosiery, cosmetics, brassieres, cigarettes, cigars, tobacco, comic books, greeting cards, magazines, cookies, milk, macaroni, canned meat, fresh fruit, canned fruit and vegetables, orange juice, dried peas and beans, bottled gas, bedding, soap, appliances, toys, drapery hardware, furniture, bread, coffee, tea, spices, peanut butter sandwiches, sponges and cast iron soil pipe.

The box score for the Robinson-Patman defenses during the past year is no hits and no runs. There has been no progress in cost justification in cases litigated during the year. The last full scale cost defense presented in a fully litigated Robinson-Patman case is rumored to have cost in excess of $100,000. Few companies can afford this type of luxury. There is a need in Robinson-Patman proceedings for a realistic approach and a simplification of the cost defense.

The other major defense, that of meeting competition in good faith, has been in litigation off and on for two decades. The courts have described it as an absolute defense, but the Commission steadfastly and proudly refuses to concede.

It has been claimed that the defense is not available when a "premium" product is sold at a "nonpremium" price. This is a denial of the defense, which is that a competitive price may be *met* in good faith. It requires a unique economic or philological alchemy to

conclude that "meet" does not mean "meet" in the case of a seller whose product has a higher degree of public acceptance. Of course, "good faith" is and should be a litigable question in such situations and in all situations where the defense is used. This prevents the defense from being used by a powerful competitor with the intent of driving smaller competitors out of business. Such intent clearly negates good faith.

The defense has been limited to individual competitive situations or even to individual transactions, and this is based upon the ancient case involving the Staley Company of Decatur. This, too, in many situations may represent a denial of the defense. What is neglected is that the systematic matching of prices in the *Staley* case involved also the matching of higher prices which included that demon of the old basing point conspiracy cases, phantom freight.

A third limiting criterion is that the seller must satisfy himself that the price he meets is lawful before he meets it. If the seller actually does know the "met" price to be unlawful, the limitation makes sense, but this would be unusual. At most, in some cases, a seller might suspect that a lower price quoted by a competitor may be unlawful. How can he *know* a price of a competitor is unlawful when even the Supreme Court splits 5-4 as in *Standard Oil II?*

Possibly most constrictive is the limitation of good faith meeting of competition to defensive situations; that is, to retain business, but not to obtain new business. What is the basis of competition? It is not to be self-satisfied with the status quo; this is not competition but economic stagnation. The essence of competition and the keystone of growth of our free enterprise system is freedom to attract new business. And this is more important to a small, growing business than to a large, established one.

III. Procedural Developments

Moving from case litigation, we find one important procedural development at the Federal Trade Commission. This is the new FTC investigational technique. There was a time when the *least* fortunate Robinson-Patman lawyer learned of an investigation of his client only after complaint was filed. The *less* fortunate lawyer sometimes learned of a Robinson-Patman investigation, when possibly in the course of discussing some other corporate matter, the client would

remark, "Say, there were a couple of fellows down here a week ago who carted off some of our invoices. I understand they are from some alphabetical agency in Washington and they said something about price discrimination, whatever that is." The *more* fortunate lawyer, in days gone by, was one who received a more timely telephone message along the following lines: "I thought I had better call you. There are a couple of distinguished looking gentlemen in the lobby—I'm not sure, but their names might be Robinson and Patman—and they want to rummage around in our files."

Well, all these may now be passé. The lawyer now should not be at all surprised to receive the following message: "I have a letter here from FTC at Washington, with all sorts of questions. I think you had better come over and have a look at it."

The lawyer goes over and what does he find? He finds a *"do it yourself"* investigation kit.

Not enough is known about the use of this new technique under Section 6(b) of the FTC Act at the present time to evaluate it fully. But certainly, the use of the technique in individual situations should be carefully scrutinized by the Bar and the courts. Several months ago, the U. S. District Court for the Southern District of New York could not be required to investigate itself by answering conjectural held that a party under investigation for possible violation of Section 7 questions. This was in the enforcement of a special report addressed to the St. Regis Paper Corporation.

In speeches before the American Bar Association two weeks ago, Chairman Kintner and FTC General Counsel McCauley described the impressive accomplishments of the new mail order investigational technique. 118 special reports have produced 58 Robinson-Patman complaints.

It has been claimed that the broad approach should be comforting to your clients because their competitors will also be in the same boat, but don't be at all surprised if they don't look at it that way. They may say, "Yes, and wasn't it a great comfort to all those good people to know they were not alone on the Titanic."

At any rate, we must concede that Mr. Kintner has come up with a highly effective investigational weapon. But we predict that its success before the courts will rest upon the *manner* of its use, not its *effectiveness*. If used with moderation and good sense and with

the effect of preventing the supreme discriminatory effect of a suit against a single company in an industry, the mail order technique will probably be sustained on the basis of the 1950 *Morton Salt* decision. But if a short-cut-minded complaint counsel runs wild, it is likely that the ghost of the 1924 *American Tobacco* decision will walk again. Census reports may be effective in merger cases, but seeking them instead of the underlying information raises an issue not decided in *Morton Salt*.

The year has seen no other significant procedural development at FTC. But there is in the works a project which could be of great importance to all who have occasion to practice before the Federal Trade Commission. For the past year and a half, a special committee of the American Bar Association, with the full cooperation of the Commission, has been working on a project to conform the Federal Rules of Civil Procedure for use before the Federal Trade Commission.

In the past 10 years, FTC rules have moved in the direction of the Federal rules, but with respect to discovery by the respondent, the FTC rules have lagged behind. In the not too dim past, discovery at FTC was described as a "one-way street." There has been improvement, spurred by the *Jencks* case, and this should continue. The next year holds promise for the adoption of rules which will enable the respondent to develop defensive facts under procedures similar to those now available in the Federal courts.

IV. Legislation

The only Robinson-Patman legislation enacted in the period was Public Law 86-107 making Clayton Act orders final and providing civil penalties. Proposed but not enacted were numerous bills which would make it an unlawful price discrimination *to fail to impose* functional price differences between purchasers in different functional classes. The target of these bills is the chain store. The purpose is to *require* that wholesalers be given a functional discount. There has been no action on this legislation. Nor has there been any significant action with respect to any of the 22 bills introduced in the last two sessions which would make Section 3 of the Robinson-Patman Act actionable in private causes.

S. 11, which has now become a "perennial," and which would limit the good faith meeting of competition defense, was not submitted for floor action.

V. A Look at the Future

As we look at the future under Robinson-Patman we see the likelihood of even greater numbers of cases. This arises from the fact that Robinson-Patman cases beget Robinson-Patman cases. As actions by FTC increase, its budget requests are more favorably received—adding funds for a still greater rate of activity. And we have seen how FTC cases spawn private cases.

Robinson-Patman is today a very important area in antitrust. New cases, new ideas, new methods, and new results have replaced the old approach of "Make lots of noise, but keep the appropriations low." Funds have been made available and are being used.

There is no ameliorating legislation in sight. The Democratic platform promises increased enforcement and certainly the Republicans show no intent to backtrack from the record which has been established. This presents a rather gloomy picture for American business which sees in many 2(a) Robinson-Patman complaints and cease and desist orders some erosion of freedom to compete effectively, in 2(c) the denial to brokers of the right to compete in price and in 2(d) and 2(e) a trend toward promotional featherbedding, payment for services neither wanted nor needed.

Are there any encouraging signs at all? Yes there are. The most promising is the attitude of the courts in refusing to award damages unless they can be proved. Another is the continued abstention of the Department of Justice from amended Clayton Act Section 2 litigation, although it has matched FTC case for case under amended Section 7.

Another favorable aspect is that, aside from the activating of Section 3 of Robinson-Patman as a private cause of action, the possibility of legislation extending the application of the Act is unlikely. Political platforms notwithstanding, there are many in Congress who feel that the Robinson-Patman situation is bad enough already.

Also, despite the emphasis on record numbers of Robinson-Patman cases, all is not gloom at the Federal Trade Commission. There was one very important administrative development on May 19, 1960.

This was the publication of Guides for Compliance with Subsections 2(d) and 2(e) of the statute.

In James Michener's recent best seller "Hawaii," it was interesting to read about the painstaking work by the Reverend Hale, translating part of the Bible into Hawaiian. The task faced by Rev. Hale was probably less difficult than that faced by ten top FTC lawyers, who had the task of translating 14 lines of Robinson-Patman into 7 pages of English.

The FTC staff succeeded in a very difficult task. The Guides for 2(d) and 2(e) are clearly and concisely written. However, it is important to know what the Guides are and what they are not. The Guides are a compilation of case precedents and modes of conduct which the enforcement agency presently considers desirable. They are no more than that. They are not legislative rules. FTC's legislative rule-making power under Robinson-Patman is limited to 2(a) quantity discounts. The Guides consequently have no force of law, and even full compliance does not guarantee safety, for the Guides contain the specific disclaimer that compliance will not necessarily shield a company from prosecution.

The lawyer using the Guides should keep in mind the following concluding comment of the U. S. Court of Appeals for the Second Circuit in the 1958 *Atalanta* case overruling an FTC interpretation of 2(d):

> "The argument is also made that because the Commission has a special competence in the field of grocery chain stores, its determination as to whether a given practice violates the Robinson-Patman Act cannot be disturbed. The expertise possessed by an administrative agency, however, does not permit it to rewrite the laws which it has been charged with enforcing. This is the function of Congress."

Thus, a lawyer cannot safely advise his client solely on the basis of the Guides, but lawyer and client will find the guides helpful in planning a compliance program. The Guides represent an important step by FTC in a very difficult area because they are the clearest expression of what the enforcement agency is presently thinking.

If, as reported by a business journal, this ambitious project will be limited to Subsections 2(d) and 2(e), it is regrettable but under-

standable; translation of some of the other sections of the Robinson-Patman statute would be an even more difficult project.

There is another area of promise at FTC. Many members of the Bar must have shared a feeling of elation at an article in a business periodical on August 31. The heading on a commentary regarding Chairman Kintner's August 30 address to the ABA read: "FTC seeks way of allowing firms to end monopoly practices without legal action." This would surely be a most salutary development under the Robinson-Patman Act. Unfortunately, the printed text of the speech did not fully live up to the promise of the headline. No concrete program has been developed or tentatively planned, but the idea is sound and its very expression is encouraging.

Consider the recent wave of brokerage cases. It would seem that a trade practice conference or some other informal approach should dispose of these matters more speedily, more effectively, and certainly more economically for FTC as well as the respondents than litigation of 58 separate complaints. It is true that informal disposition would leave FTC without the $5,000 fine for violation of cease and desist orders, but the threat of complaint would be a great deterrent. Also, there would be incentives within the group for compliance, for the FTC action will probably result in a stabilizing influence, not seriously different from the result sought by some trade associations in bygone days until the law caught up with them.

The cease and desist order in Robinson-Patman is often an overrated instrument for aiding business, particularly small business, and for terminating practices believed to be substantially lessening competition. The cure in some cases may be worse than the "disease." The Robinson-Patman proceeding often tends not to "protect competition" but to "protect from competition."

Not long ago, at a Robinson-Patman hearing, the sales manager of a respondent company was asked: "If a cease and desist order issued in this case, what would you do?" Counsel supporting the complaint objected on the basis that the point was "irrelevant."

What could be more relevant? Is that not the crucial point? Lawyers inside and outside the Commission must look ahead, beyond the cease and desist order. It is never too early to talk and think of the remedy. The fact situation being litigated must be compared with that which experience shows will follow in the wake of cease and desist orders under R-P.

Robinson-Patman was conceived, promoted and enacted as small business legislation. In action, however, small business seems to have found itself quite often at the wrong end of the stick. The *Broch* case, the 58 recent brokerage cases and their more than 200 predecessors are mostly against small business. Some of the recent 2(d) cases seem to be against small victims of economic power.

Nor does a case against a large company necessarily aid small business. For example, FTC charged a leading seller with violation of Robinson-Patman by reason of a volume discount. The discount to many customers was based upon the total purchases by each of the various customers from all sellers. Obviously this could not be successfully defended by any seller on the basis of the Robinson-Patman Act cost justification defense, because each seller's ultimate price depended upon the total volume from all sources. A cease and desist order was issued. Thereafter, the respondent seller set up volume discount arrangements based only upon its own sales to each customer. The ultimate result was that many customers began to purchase their entire requirements from the respondent seller in order to qualify for the greater volume discount. The respondent's business expanded. But other smaller sellers who formerly shared in the business of individual customers were shut out of the market. Query: Which situation was better for competition, the pre-existing selling system or that which resulted after the cease and desist order?

A second case is more typical. It involves a company selling to numerous large volume customers and numerous small volume customers. The discounts to the large volume customers are greater than those to the small volume customers. Cost justification is either not attempted because of the high cost or, if attempted, fails because of technical deficiency. The seller complies with Robinson-Patman by terminating sales to the small volume customers. He continues the same discounts to the large volume customers or may even increase them because his cost of business is lower by reason of savings arising from not selling in small quantities to the many small volume customers.

In some situations, production for small volume accounts may be subsidized by the large volume base of sales to large volume buyers. Disproportionate amounts of selling time may be devoted to servicing small accounts. Faced with the choice between cost justifying at

exorbitant expense or terminating direct sales to the small volume customer, the selling company confronted with the Robinson-Patman Act finds it easier to terminate the relationship with the small volume accounts.

The small or medium volume buyer considers it an important step in his forward progress when he finds himself able to buy directly from the manufacturer. Though his discounts may not be quite as long as those of some of his larger competitors, they are often better than those he obtained previously when buying through intermediaries. Now in many cases, due to Robinson-Patman, this concern may be unable to buy directly. A workable, simplified, rule of reason cost-justification system would contribute much to solution of this problem.

A third example is the series of FTC Robinson-Patman actions and orders against buyer groups, small businessmen who have joined together and pooled their buying power in order to approach the prices available to their largest competitors. Cost justification is impossible. These cease and desist orders seem directly contrary to the spirit of Robinson-Patman.

We meet here today as lawyers—federal lawyers and private lawyers. All of us have a special interest in the American competitive economic system or we would not be here. I firmly believe, and am confident most will agree, that on both sides of the counsel table we have the common objective of supporting the national antitrust policy and our competitive economic system.

The federal lawyer is a public advocate. He is in a position of public trust. His objective must be protecting competition from abuse, not protecting congressional appropriations by numbers of complaints. He has a responsibility to find the facts—all of the facts and not merely those which might technically justify a complaint. He must look behind the price list. He must look behind the invoice. These are only symptoms, not causes.

The greatest challenge of the federal lawyer is that he must learn to think more constructively about the remedy. If he cannot improve the present situation, why not leave it alone? A cease and desist order, boilerplated in the cold language of the statute, is not an end in itself. Perhaps FTC could profit from Guide 6 under 2(d) and 2(e). Before issuing each Robinson-Patman complaint, it might well ask the moving counsel: "What is your Plan? How is this case going to be good for competition?"

The private lawyer's primary responsibility is planning a compliance program that will shield his client from complaint. Considering the limitation of the defenses, this program will not always be easy, but it is vastly easier before a cease and desist order than after. Despite the sometimes unreasonable application of the statute, advance planning can still remove most of the risk from doing business under Robinson-Patman. Preventive law was never more important than it is today under this statute.

The second major responsibility of the private Bar arises where complaint has issued. Only the inspired and energetic defense of two Chicago companies brought common sense to Subsections 2(b) and 2(f) of Robinson-Patman. There is another area of great future promise under Robinson-Patman. This lies in giving new vitality to the words "substantially lessen competition," by legwork, advocacy and whatever tools are available. Circumstances which "may substantially lessen competition" should never be presumed or assumed—these should be a necessary element of proof. An invoice under *Anheuser-Busch* is evidence of discrimination but it is not "reliable, probative and substantial" evidence of injury. The stakes are high. What was merely a "slap on the wrist" under the old law may now become, under the $5,000 per invoice penalty of Public Law 86-107, a "slash at the jugular" of competition. The struggle to preserve genuine competition while eliminating abuses, which are and should be unlawful, will be uphill all the way because of unfortunate precedents. We must begin the hard way by actually shouldering the burden of *disproving* injury. This, too, is quite a challenge.

In conclusion, a word to Chairman Kintner who honors us with his presence here today:

Mr. Chairman, while we question whether some applications of the Robinson-Patman Act are in the public interest, we fully recognize your duty to enforce the statute. And you have our respect for the vigor with which you have approached your task.

We realize also that you are doing your best to make the Robinson-Patman Act a full employment Act for lawyers, but honestly, Mr. Chairman, here in Chicago we already have plenty of work, and our clients simply cannot afford any more Robinson-Patman.

PART II

- MEETING "AN EQUALLY LOW PRICE OF A COMPETITOR": A PLEA FOR JUDICIAL CLARIFICATION OF A JUDICIAL CONSTRUCTION

  by Thomas B. Moorhead

- ANTITRUST NEWSLETTER

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MEETING "AN EQUALLY LOW PRICE OF A COMPETITOR": A PLEA FOR JUDICIAL CLARIFICATION OF A JUDICIAL CONSTRUCTION

by

THOMAS B. MOORHEAD*

> "For when people are obliged to have recourse to courts of judicature, this should come from the nature of the constitution, and not from the contradiction or uncertainty of the law." [1]
>
> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . nothing . . . shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . " [2]

So reads, in part, §2(b) of the Robinson-Patman Act. The above section is a complete defense to a charge of price discrimination,[3] but its protection is considered available only in individual competitive situations,[4] and does not protect the seller who adopts the illegal pricing system of a competitor.[5]

The Supreme Court may have added another qualification to §2(b)—the price of the competitor met by a seller must also be a "lawful" price in order to gain the protection of §2(b). In its 1951

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1 Montesquieu, *The Spirit of Laws,* Book VI, Chap. I. Quoted in Morris, *The Great Legal Philosophers,* 164 (1959).

2 15 U. S. C. §13(b).

3 *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 241 (1951). Hereinafter referred to as 1951 *Standard Oil.*

4 *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U. S. 746, 753 (1945), *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 725 (1948), *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419 (1957).

5 Thus §2(b) would not protect one who adopted an illegal basing point delivered price system of a competitor or one who adopted a competitor's phantom freight charges. See cases note 4, *supra.*

Standard Oil decision,[6] involving discounts by Standard Oil to four jobbers in the Detroit area, the Court sometimes said that it was necessary for the seller to show that a competitor's price was "lawful," [7] and other times used the statutory language of "equally low price of a competitor." [8]

On remand, the Federal Trade Commission held that Standard Oil had not shown that its lower price was made in good faith to meet the equally low price of a competitor. On appeal, the Court of Appeals vacated the Commission's cease and desist order and noted in the course of its opinion:

> "It is interesting and highly significant that the statute employs the language, 'made in good faith to meet an equally low price of a competitor,' but that the Supreme Court in the instant case adds the word 'lawful,' so that it reads, 'made in good faith to meet a lawful and equally low price of a competitor' . . . We do not know, of course, why the Supreme Court added the word 'lawful' but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a 'good faith' defense was not available to a seller who had met an unlawful price." [9]

The Court is here undoubtedly referring to the *Staley* and *National Lead* line of cases which held that a seller may not adopt the illegal pricing *system* of a competitor. The Court does not seem to be considering the individual competitive situation wherein the seller meets a competitor's price which is in fact an illegal price.

The Supreme Court granted *certiorari* and affirmed the decision of the Court of Appeals.[10] The opinion of the Court, by Justice Clark, begins with a statement that in the previous adjudication (340 U. S. 231) the Supreme Court *held* that §2(b) of the Robinson-Patman Act afforded a seller a complete defense to a charge of price

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6 See note 3, *supra*.

7 340 U. S. pp. 238, 246.

8 *Id.* at pp. 241, 245.

9 *Standard Oil Co.* v. *Federal Trade Commission*, 233 F. 2d 649, 653-654 (7th Cir. 1956).

10 *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396 (1958). Hereinafter referred to as 1958 *Standard Oil*.

discrimination if its lower price was "made in good faith to meet a *lawful* and equally low price of a competitor." [11] Four Justices dissented (Douglas, Black, Brennan and Warren) on the grounds that Standard Oil had adopted an illegal pricing *system* and thus fell within the prohibition of the *Staley* and *National Lead* decisions. Of interest is the statement by Justice Douglas in his dissent:

> "Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a *lawful* and *equally low price* of its competitor. It is only a *lawful* lower price that may be met." [12]

Lower courts differ as to whether the price met must be a lawful price to bring the seller within the protection of §2(b) of the Robinson-Patman Act. In *Enterprise Industries* v. *Texas Co.,*[13] the District Court, in holding that the defendant in a treble damage action for price discrimination had failed to justify the discrimination as necessary to meet an equally low price of a competitor, stated by way of *dictum* that a seller may meet only a lawful price of a competitor. The Court's authority would seem to be the 1951 *Standard Oil* case. On appeal there was a reversal, *Enterprise Industries* v. *Texas Co.,*[14] on the grounds that the evidence as to damages was insufficient. The Court of Appeals did not consider any of the Texas Company's defenses under §2(b) of the Robinson-Patman Act or the lower court's discussion thereof. *Certiorari* was denied.[15] Presumably, however, if the District Court were again presented with the problem of lawfulness, its holding could follow the *dictum* laid down in its original decision.

Contrary to the *Enterprise* case is *Standard Oil Co.* v. *Brown.*[16] The Court, in squarely facing the problem, framed the issue thus:

> "The decision of this case depends on the question whether the proviso in Section 2(b) of the Clayton Act as amended by

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11 355 U. S. 396, 397 [emphasis added].

12 *Id.* at p. 408 [emphasis by Justice Douglas].

13 136 F. Supp. 420 (D. Conn. 1955).

14 240 F. 2d 457 (2d Cir. 1957).

15 353 U. S. 965 (1957).

16 238 F. 2d 54 (5th Cir. 1956).

the Robinson-Patman Act which, following a prohibition against selling at a discriminatorily lower price to a purchaser, permits the seller to defend by showing that his lower price 'was made in good faith to meet an equally low price of a competitor' is to be construed as if it were written 'was made in good faith to meet a *lawful* equally low price.' "[17]

The case arose in the following manner. Plaintiff charged Standard Oil with price discrimination and sued for treble damages. Standard Oil admitted the discrimination and interposed §2(b) of the Robinson-Patman Act as a defense, claiming that the lower prices were good faith attempts to meet a competitor's price. At the trial of the action, the trial judge did not charge the jury, although requested to do so by counsel for plaintiff, that it was necessary for the competitor's price which Standard Oil claimed to have met to be a lawful price. The jury returned a verdict for Standard Oil and the plaintiff moved for a new trial on the basis of the trial judge's failure to charge that the competitor's price must be a lawful price. The trial court granted the motion, a new trial was had, and a verdict was returned in favor of plaintiff which was trebled by the trial court. The case at bar is an appeal from the second verdict.

In reversing the trial court and reinstating the original verdict, the Court of Appeals pointed out that the plaintiff had cited no case in which the defense of §2(b) of the Robinson-Patman Act had been denied to a seller because of a failure by the seller to show that the competitor's price was a lawful price. Apparently the plaintiff rested his case on the authority of the *Staley* and 1951 *Standard Oil* cases. The Court of Appeals, in an opinion by Judge Tuttle, held that the Supreme Court did not intend by its 1951 *Standard Oil* decision to add the word "lawful" to §2(b) of the Robinson-Patman Act and that there was no authority which would support plaintiff's contention. The case was not appealed to the Supreme Court.

Balian Ice Cream Co. v. *Arden Farms Co.*,[18] deserves brief mention. Arden Farms had cut prices on certain brands of its ice cream in the Los Angeles area but maintained the existing price in the other areas in which its products were sold. Section 2(b) of the Robinson-

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17 *Id.* at p. 55 [emphasis by the Court, footnote omitted].

18 231 F. 2d 356 (9th Cir. 1955), *cert. denied*, 350 U. S. 991 (1956).

Patman Act was relied upon as a defense in an action brought by competitors for treble damages. The Court of Appeals noted that:

> "It was not incumbent upon Arden to establish, under the circumstances of this case, the lawfulness of the prices which it claimed to meet." [19]

Any value which this pronouncement might have, however, is lessened when, later in its opinion, the Court pointed out that the trial court had made an express finding that Arden's price cuts were made in good faith "to meet the *lawful* and equally low prices of its competitors." [20]

Perhaps the most plausible answer to the doubt and confusion engendered by the decisions of the Supreme Court is that the "lawfulness" of a competitor's price is only one of the elements to be considered in arriving at the "good faith" of one charged with a Robinson-Patman Act violation, when §2(b) is relied upon as a defense.[21]

Certainly, however, industry is entitled to a clarification of the Court's position—especially in view of the fact that no requirement of "lawfulness" is written into the statute. For it is indeed true that recourse to the courts should not be made necessary by "the contradiction or uncertainty of the law."

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[19] *Id.* at p. 366.

[20] *Id.* at p. 369 [emphasis added].

[21] This answer is suggested by the *Report of the Attorney General's National Committee to study the Antitrust Laws* 182 (1955).

ANTITRUST NEWSLETTER

Supreme Court (as of October 17, 1960)

Dkt. 50—*Noerr Motor Freight, Inc.* v. *Eastern Railroads Presidents' Conference,* 273 F. 2d 218 (3d Cir.), petition filed March 3, 1960. Petition granted April 18, 1960.

Noerr's complaint alleged that the activities of the railroads and its public relations agency in soliciting public support for or opposition to state legislation affecting its competitive position in the long-haul freight business violated Sections 1 and 2 of the Sherman Act. The railroads counterclaimed alleging acts on the part of truckers of substantially the same character and nature. The District Court dismissed the counterclaim and found that the "fomenting of government restriction [by the railroads] . . . increasing the cost of operation and/or preventing the carrying of greater loads" [155 F. Supp. 768, 833] by the truckers amounted to a violation. An injunction restricting lobbying activities was issued and damages awarded predicated on a theory of dual injury to the truckers' good will, *i.e.,* that of their respective customers and that of the public. A divided Circuit Court affirmed on the theory that the railroads had acted with the extra-legislative purpose and effect of impairing the good will of the trucking industry. Judge Biggs dissented on the theory that legislative restraints were not such as are cognizable under the Sherman Act, irrespective of their effect. Observing that neither the District nor Circuit Court opinions specified which section had been violated, Judge Biggs questioned the constitutionality of the injunction as well as the method utilized to calculate damages.

Dkt. 55—*United States* v. *E. I. duPont de Nemours and Company,* 177 F. Supp. 1 (N. D. Ill.), petition filed March 11, 1960. Probable jurisdiction noted May 23, 1960.

This action stems from the District Court's opinion regarding relief which, in turn, was necessitated by the mandate in the decision of the

Supreme Court which adjudged duPont's acquisition and retention of 23% of General Motors common stock to be a violation of Section 7 of the Clayton Act (353 U. S. 586). The District Court, upon remand, held that duPont could continue to hold the General Motors stock provided that certain devices were imposed for the purpose of insulating such ownership from its natural and usual results.

In a case which it characterizes as "a landmark in the history and development of the antitrust laws," the Government argues that divestiture is the only remedy available once, as here, the acquisition has been held to be illegal or, in the alternative, that the insulating devices adopted by the District Court are inadequate.

Dkt. 65—*Brown Shoe Company* v. *United States,* 179 F. Supp. 721 (D. C. Mo.), appeal filed April 1, 1960, probable jurisdiction noted June 20, 1960.

The District Court held that the merger of the fourth largest shoe manufacturer in the United States with the largest family shoe chain retailer in the country, resulting in the manufacturer becoming the third largest, substantially lessened competition and tended to create a monopoly in the manufacture and retailing of men's, women's and children's shoes in every city of 10,000 or more population, and its immediate and contiguous surrounding area, and that such merger was in violation of Section 7 of the Clayton Act. Brown particularly challenges the Court's findings with respect to "lines of commerce," *viz.,* men's, women's and children's shoes and "section of the country," *viz.,* cities of 10,000 or more and their immediate and contiguous surrounding area. Petitioner also alleges that the lower court erred by failing to distinguish the appropriate lines of commerce with respect to shoe manufacturing as opposed to shoe retailing. In its motion to affirm, the Government takes the position that no substantial questions of law are presented by Judge Weber's opinion.

Dkt. 73—*Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.,* 273 F. 2d 196 (7th Cir.), petition filed April 25, 1960. Certiorari granted June 6, 1960. Motion of Parmelee Transportation Co. for leave to file brief, as *amicus curiae,* granted October 10, 1960. Motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted October 17, 1960.

The Court of Appeals affirmed the District Court's dismissal of a treble damage action based on defendant's alleged Sherman Act

combination and conspiracy to control the manufacture, sale, use and installation of gas burners and furnaces on the ground that the complaint failed to allege injury to the public in the form of any appreciable lessening in the sale of gas burners or furnaces, or by the public's deprivation of a product of overall superiority.

Dkt. 87—*Tampa Electric Company* v. *Nashville Coal Co.,* 276 F. 2d 766 (6th Cir.), petition filed May 12, 1960. Certiorari granted June 27, 1960.

A divided Circuit Court affirmed the District Court's holding that a contract whereby a public utility company agreed to buy from a coal mining company "all" the coal needed by the utility for twenty years in two of its eleven units and for any other new units built at the site of the units during the first ten years of the contract, was invalid under Section 3 of the Clayton Act and therefore unenforceable. In his dissent, Judge Weicke argued that Congress had provided private parties the specific remedies of treble damages and injunction which should not be augmented by the courts' vitiation of contracts made in violation of the Clayton Act. Even if the Clayton Act were applicable to vitiate a contract in the instant type of situation, the dissenting judge was of the opinion that a requirement contract did not come within the scope of the Act unless it prohibited the buyer from dealing in the goods of anyone else and operated substantially to lessen competition or create a monopoly, neither of which conditions was met by the instant facts. Tampa contends that Section 3 has no application to contracts to "purchase"; that the relevant product market embraces Nashville's competition from all boiler fuels; that the relevant geographic market is Eastern United States and not just Florida; and that the Clayton Act was never intended to vitiate a requirement contract made by a single public utility to insure a continuing supply of boiler fuels at a constant price.

Dkt. 203—*Eli Lily and Company* v. *Sav-On-Drugs, Inc.,* 31 N. J. 591, 158 A. 2d 528 (1960), appeal filed June 30, 1960, probable jurisdiction noted and case transferred to summary calendar October 17, 1960.

From the New Jersey Supreme Court's *per curiam* affirmance of the Superior Court's dismissal (57 Super. 291, 154 A. 2d 650) of its action for injunctive relief under the Fair Trade Law, Lily appeals. The dismissal was premised on a finding that Lily was "doing busi-

ness" in New Jersey and, since it had not registered as a foreign corporation, was ineligible to sue for the enforcement of a contract in New Jersey.

Lily contends that Article I, Section 8 of the United States Constitution forbids the application of state qualification statutes to foreign corporations engaged in interstate commerce; that even if it were "doing business" in New Jersey, the State may not constitutionally require a foreign corporation to secure its approval to transact interstate business. Furthermore, even if the constitutionality of the New Jersey qualification statute be upheld, the no-suit sanction also offends the Commerce clause.

Dkt. 361—*Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 32 N. J. 459, 161 A. 2d 246 (1960), petition filed August 24, 1960.

Gold's initial complaint alleged the common law tort of interference with business relations based on unfair competition, *i.e.*, Esso's offers to Gold's customers to sell at a lesser price than that at which Gold allegedly could buy. The amended complaint based its charges of unfair competition on asserted violations of the Sherman and Robinson-Patman Acts.

The New Jersey Supreme Court affirmed the Superior Court's dismissal (59 N. J. Super. 6, 157 A. 2d 30), which was predicated on the finding that the action was based solely upon federal statutes, jurisdiction of which are vested exclusively in the federal courts.

Esso contends that jurisdiction for review is lacking in that Gold has asserted rights based only on the common law of New Jersey.

Dkt. 368—*American Motor Specialties Co.* v. *F. T. C.*, 278 F. 2d 225 (2d Cir. 1960), petition filed August 30, 1960.

Petitioners seek certiorari from the Second Circuit's affirmance of a cease and desist order charging them with violations of Section 2(f) of the Clayton Act. Seventeen jobbers organized group buying organizations in 1938, ostensibly for the purpose of obtaining increased rebates from their suppliers. Members' orders were placed on the organizations' forms but were not consolidated. Shipments were made directly to the individual members and not to the organizations. The rebates were made to the organizations which periodically distributed same to the members in the proportion which each member's purchases bore to groups' total purchases. The pricing systems of the organizations' suppliers had previously been held violative of Section

2(a) in *Standard Motor Products* (265 F. 2d 674), *Whitaker Cable Corp.* (239 F. 2d 253) and *Moog Industries* (238 F. 2d 43, *aff'd* 355 U. S. 411). The Circuit held that the very act of combining and of thereby becoming eligible for more favorable price treatment than was available to their unorganized competitors resulted in the organizations and their members being charged with the requisite knowledge that the price differential could not be justified.

Petitioners contend that this rationale is at odds with that expressed in *Automatic Canteen* (346 U. S. 61). Pointing out that the aforementioned Section 2(a) cease and desist orders against the three suppliers did not become final until long after the purchase orders involved in this action, petitioners contend that the record is barren of any evidence to indicate that they had any reason to believe that the suppliers had no defenses available to justify the alleged discriminations.

Petitioners also contend that Section 4 of the Robinson-Patman Act (15 U. S. C. 13b) insulated the organizations' activities.

Dkt. 375–*F. T. C.* v. *Dilger,* 276 F. 2d 739 (7th Cir. 1960), petition filed August 31, 1960.

In an action ancillary to a Section 7 proceeding against Beatrice Foods Co., the Commission moved for an order in the District Court for the Northern District of Illinois to require Beatrice to produce those of its copies of schedules submitted to the Bureau of Census in 1954 pursuant to Section 9a of the Census Act (13 U. S. C. 9) which it retained in its files. The District Court granted the motion but the Court of Appeals reversed, holding that the Census Act prohibited such production. The question presented is whether the Census Act precludes the Commission from subpoenaing from reporting companies–not the Census Bureau–their retained copies of schedules submitted to the Bureau pursuant to said Act. Analogizing the income tax return cases, the Commission contends that the Census Act only prohibits the disclosure by Department of Commerce personnel of reports submitted to the Census Bureau. Here, the Commission seeks an order directed to the reporting company, not the Census Bureau, which would compel production of such copies as the reporting company may have retained, not the original which was submitted to Commerce.

The Solicitor General has filed a memorandum on behalf of the Secretary of Commerce urging affirmance of the Circuit Court decision in which it is represented that "a contrary decision would have a serious effect on the operations of the Department of Commerce." Reporting companies retain copies at the Department's request in order to facilitate discussions with the Census Bureau, says the Secretary, and, hence, they too should be cloaked with the confidential privilege. The Commission's reply to the Secretary's memorandum is to the effect that this case is controlled by existing legislation and that pleas for changes thereof are improper when directed to the judiciary.

Dkt. 385—*Niresk Industries, Inc.* v. *F. T. C.*, 278 F. 2d 337 (7th Cir. 1960), petition filed September 6, 1960.

Petitioner appeals from the Circuit's affirmance of a Commission cease and desist order charging Niresk with violations of Section 5 of the FTC Act in that its advertising with respect to price and its use of the Westinghouse name and the Good Housekeeping Guaranty Seal was false and/or deceptive. Concentrating on the pricing issue, the petitioner contends that inasmuch as the only evidence before it on this issue was the price at which petitioner sold the electric frying pan, its cost to petitioner, and the testimony of two buyers from Chicago department stores of the regular price of allegedly comparable merchandise in downtown Chicago department stores, the Commission's findings are not supported by "substantial evidence."

Dkt. 425—*United Shoe Machinery Corp.* v. *Hanover Shoe Co.*, 1960 Trade Cases, ¶69,574 (3d Cir. 1960), petition filed September 20, 1960.

Hanover instituted a Section 2 action in 1955 alleging damages in the trebled amount of $5¼ Million by reason of United's monopolistically excessive rental and royalty charges. Such damages constitute excess charges as opposed to "loss of profits." Hanover contended that it suffered injury at the moment it paid the excess costs, while United argued that all alleged excess costs were "passed-on" by Hanover to its customers and, hence, that it sustained no injury. A separate trial on the issue of whether such excessive charges constituted an injury to plaintiff's "business or property," as that term is used in Section 4 of the Clayton Act, resulted in judgment for Hanover.

On interlocutory appeal, the Circuit affirmed *per curiam.*

Citing the oil jobber line of cases, United contends that the concept of injury is negatived if there is proof of passing-on; that only where there is proof that the illegal exactions were absorbed by plaintiff should recovery be permitted.

Dkt. 435—*Dart Drug Corp. of Md.* v. *Ellis and Selma Gadol,* 222 Md. 372, 161 A. 2d 122 (1960), petition filed September 23, 1960.

This is an appeal from a judgment of the Maryland Court of Appeals reversing the State Circuit Court and directing the issuance of a permanent injunction.

The Gadols brought an action under the Maryland Fair Trade Act to enjoin Dart from selling branded products below the minimum retail prices established by four manufacturers. The manufacturers were not parties to the suit and none of the parties to the action had signed any fair trade contracts. The Circuit Court denied plaintiffs' prayer because of the failure of the manufacturers to seek to compel compliance. The Court of Appeals, however, reversed and held that the Maryland Fair Trade Act created a cause of action for the protection of a competing retailer from price cutting whether or not the manufacturer chose to sue.

Dart contends the underlying rationale of all fair trade laws is the protection of manufacturers' good will and not to protect a competitor from the exigencies of competition. "This court cannot let stand, without review, a construction of state Fair Trade legislation which [sanctions horizontal price fixing]."

F. T. C. v. *Murray SPACE Shoe Corp.* (FTC Dkt. #7476, Init. Dec., Oct. 25, 1960).

An order by a Federal Trade Commission hearing examiner would require Murray SPACE Shoe Corp., Bridgeport, Conn., to discontinue unqualified claims that its molded shoes (custom made over plaster cases of customers' feet) have therapeutic qualities and will correct, prevent or relieve various diseases and ailments.

Also cited in Examiner Everett F. Haycraft's order are the concern's officers and sole stockholders, Alan E. and Lucille Marsh Murray. They also are officials and stockholders of three other Murray SPACE Shoe Corporations (of New York, New Jersey and

Delaware) formed to take over the business of their former copartnership, Alan E. Murray Laboratories.

At the same time, the examiner ordered dismissal, for failure of proof, of the charge in the FTC's complaint of April 15, 1959 that respondents have made illegal exclusive dealing agreements with dealers.

Ruling that respondents' unlimited therapeutic representations for their Murray Space Shoes are unfair and deceptive under the FTC Act, Examiner Haycraft said these shoes "will relieve swollen ankles, swollen joints, puffiness on ball of foot, pain in the hip, high blood pressure, fatigue, sagging ankles, arthritis, hammer toes and bunions when, and only when, these conditions are caused by ill-fitting shoes, or shoes that do not conform to the shape of the foot. The wearing of the Murray Space Shoe will not correct or prevent such conditions when they are caused by, or are due to, a systemic condition of the person wearing them, such as diseases of the heart or the kidneys."

Accordingly, he directed that such claims in the future be clearly limited to disorders resulting from ill-fitting shoes.

Also forbidden by the order are representations that the shoes will correct, prevent or relieve indigestion or stomach ulcers.

Turning to the exclusive dealing charges in the complaint, the examiner found that various agreements used by respondents contained clauses restricting chiropodists, podiatrists and retailers from dealing in other manufacturers' molded shoes.

However, he held, the effect of sales under these restrictive conditions "has not been, is not now, and may not be to substantially lessen competition with respondents in the sale of molded shoes, or between customers of respondents, or to create a monopoly in respondents in the molded shoe industry. The allegations of the complaint to this effect are not supported by the evidence in the record."

Examiner Haycraft said: "From about 1941 until 1953, respondents were probably the only manufacturers of molded shoes of any consequence in the United States. The volume of sales of respondents, for the years 1953 to 1958, was as follows: 1953—5,154 pairs; 1954—7,750 pairs; 1955—10,934 pairs; 1956—12,550 pairs; 1957—11,921 pair; 1958—7,742 pairs. However, as the popularity of the Murray SPACE Shoe increased among chiropodists, podiatrists and orthopedic surgeons, many of the customers of respondents who had been trained in Murray techniques began to manufacture for themselves and, de-

spite the restrictive clauses in their contracts, as hereinbefore described, competitors of respondents increased, not only in number, as hereinbefore indicated, but also in volume of business, until by 1958 at least one of their competitors replaced them as the largest manufacturer in the industry. The volume of sales of molded shoes by Dr. Silverman, in 1958, exceeded the volume of respondents' sales during that year. Also, the volume of sales of molded shoes of the Jerry Miller company was approximately the same as respondents in 1958."

F. T. C. v. *Ipswich Hosiery Co., Inc.* (FTC Dkt. #7715, Consent order, Oct. 24, 1960).

Ipswich Hosiery Co., Inc., Manchester, N. H., is prohibited from discriminating among its customers in paying advertising allowances under the terms of a consent order announced by the Federal Trade Commission.

The Commission affirmed Hearing Examiner Walter R. Johnson's initial decision based on an order to which both the company and the FTC's Bureau of Litigation had agreed.

In a complaint filed last January 5, the FTC charged that Ipswich violated Section 2(d) of the amended Clayton Act by paying allowances to some customers but not making them available on proportionally equal terms to all competing customers.

Cited as a typical recipient of these discriminatory allowances was J. Weingarten, Inc., a grocery supermarket chain with headquarters in Houston, Texas. Ipswich favored the chain with preferential payments of $450, $500 and $900 during 1957, 1958 and 1959, respectively, the complaint alleged.

The order requires that any future payments to Weingarten or any other customer be on a proportionally equal basis only.

F. T. C. v. *Kolstad Canneries, Inc.* (FTC Dkt. #7807, Consent order, Nov. 2, 1960).

A consent order affirmed by the Federal Trade Commission forbids Kolstad Canneries, Inc., Silverton, Oregon, a canner and distributor of fruits and vegetables, to discriminate in price among its customers and pay them illegal brokerage.

In taking this action, the Commission adopted an initial decision by Hearing Examiner Walter R. Johnson based on an order agreed to both by the company and the FTC's Bureau of Litigation.

The FTC's complaint, issued last March 4, alleged Kolstad violated Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act by granting some wholesalers in Seattle and Yakima, Wash., substantially lower prices than their wholesale competitors, and by charging at least one large grocery chain in the Seattle area much less than some wholesalers whose retailer-customers compete with many of the chain's outlets.

The complaint further charged that some direct-buying wholesale grocers were paid so-called advertising allowances of 2½ and 3 percent which were actually discounts in lieu of brokerage, in violation of Section 2(c) of the statute.

Leonard E. Kolstad, the company's president, manager and majority stockholder, also is bound by the FTC's order halting these practices.

F. T. C. v. *Walden-Sparkman, Inc.* (FTC Dkt. #8143, Complaint, Nov. 2, 1960).

Receipt of illegal brokerage is charged in a Federal Trade Commission complaint against Walden-Sparkman, Inc., Dover, Fla., a broker purchasing citrus fruit and produce for its own account for resale.

The complaint alleges, for example, that Walden-Sparkman has made substantial purchases for its own account from Florida citrus fruit packers and has received brokerage or discounts in lieu of brokerage, which is forbidden by Section 2(c) of the amended Clayton Act. In many instances, the complaint adds, the concern received a lower price from the packers reflecting the brokerage or commission.

Also named as respondents are P. D. Walden, John B. Simpson and W. B. Sparkman, Jr., president, vice president and secretary-treasurer, respectively.

Mr. Sparkman formerly conducted the business under his own name until organization and incorporation of the company in October 1959 and for several years similarly received unlawful brokerage on purchases for his own account, the complaint charges.

F. T. C. v. *Rawlings* (FTC Dkt. #8142, Complaint, Nov. 2, 1960).

The Federal Trade Commission issued a complaint against Jack M. Rawlings, Jr., a McComb, Miss. businessman, on charges of

receiving brokerage on purchases for his own account in violation of Section 2(c) of the amended Clayton Act.

In addition to trading as Meredith Milling Co., a substantial factor in the animal feed business, Mr. Rawlings trades as J. M. Rawlings, Jr., Broker. In the latter capacity he sells cotton seed meal and hulls, soybean meal and related products for various seller-principals, and is paid an agreed-upon commission by them, the complaint says.

It alleges that Mr. Rawlings frequently buys these products for use in his own feed mill and accepts brokerage or discounts in lieu of brokerage on such purchases.

F. T. C. v. *Queen Anne County Clam Assn., et al.* (FTC Dkt. #7578, Consent order, July 24, 1960).

Two Maryland clam digger Associations have consented to a Federal Trade Commission order forbidding them to fix and enforce prices and selling conditions for seafood and to boycott dealers seeking better prices.

The order is against:

> *Queen Anne County Clam Association,* Grasonville, Md., its officers and members; *Anne Arundel County Clam Association,* Shadyside, Md., its officers and members.

The Commission affirmed Hearing Examiner Edward Creel's order filed May 23 which had been agreed to both by the respondents and the FTC's Bureau of Litigation.

In its complaint of last September 2, the FTC charged that since 1958 the respondents had conspired to suppress competition among themselves and between themselves and others in the purchase or sale of soft shell clams harvested in the Chesapeake Bay region.

Under this conspiracy, the complaint alleged, they (1) established and maintained uniform and non-competitive prices and terms for the purchase or sale of their clams; (2) boycotted dealers who purchased or sought to purchase at less than the fixed prices; and (3) used threats of reprisals, intimidation, and physical violence and other means to enforce adherence to their prices and terms.

The FTC's order halting these practices provides, however, that any association of bona fide clam fishermen acting pursuant to the

Fisherman's Cooperative Marketing Act is not prevented from performing any acts permitted by that statute.

F. T. C. v. *American Bakeries Co.* (FTC Dkt. #8120, Complaint, Oct. 11, 1960).

American Bakeries Co., Chicago, Ill., has been charged by the Federal Trade Commission with granting favored customers discriminatory prices, advertising allowances and services or facilities.

The FTC's complaint alleges that certain food-serving customers, including large interstate chains operating lunch counters, are given discounts ranging up to 7%, and certain food-retailer customers, including large interstate food chains, receive discounts ranging up to 5%. At the same time, the complaint charges, American Bakeries gives competing customers smaller discounts or none at all.

Certain units of the F. W. Woolworth variety-store chain and The Kroger Co. retail food chain are cited as typical recipients of the preferential discounts. The complaint charged that during 1959, the former was granted $3,500 on purchases of $70,000, and at the end of that year the latter was paid at the annual rate of $18,000 on purchases of $360,000.

These price discriminations may result in a substantial lessening of competition or tendency toward monopoly in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint charges.

Further allegations are that the company has paid advertising allowances and furnished services or facilities to favored customers but has not made these available on proportionally equal terms to all competing customers, as required by Sections 2(d) and (e), respectively, of the law.

For example, the complaint says, Food Fair Stores, Inc., a large interstate food chain, and other large customers were paid discriminatory allowances in 1959 and other years; and prior to and during 1959 Milgram Food Stores, Inc., a chain with some 22 retail outlets in the Kansas City, Mo., metropolitan area, regularly was supplied with special personnel, products and equipment to demonstrate American Bakeries' products.

According to the complaint, American Bakeries markets its bread and other bakery products under widely advertised brands, including Taystee, Merita and Grennan. It operates approximately 49 bakeries

and numerous sales depots located in 19 states. The company has thousands of retailer and food server customers located generally throughout the eastern half of the United States. In 1959 its total net sales were about $160 million.

F. T. C. v. *Wallace Tobacco Board of Trade, Inc.* (FTC Dkt. #8132, Complaint, Oct. 14, 1960).

The Federal Trade Commission charged the Wallace Tobacco Board of Trade, Inc., and its warehouse members with restricting competition in the purchase and sale of flue-cured tobacco in the Wallace, North Carolina market.

In a formal complaint, the FTC alleged that the Board of Trade, which is controlled by its warehouse members, has acted to prevent the expansion of existing warehouse facilities or the building of new facilities to handle the sale of tobacco at auction in the Wallace area. It also charges the Board with irregularities in the allocation of selling time to warehouses in the area.

The complaint points out that because flue-cured tobacco is a perishable item, the amount sold daily must be controlled. This is achieved by limiting selling time—the hours warehouses may conduct business each day. The Wallace market is permitted to sell 2200 baskets or piles of tobacco daily in accordance with an allotment of 5½ hours of daily selling time.

The Wallace Board has the authority to allocate this selling time among the warehouses in its market area. This is done by the floor space system, whereby each warehouse is allotted selling time in direct proportion to sales area.

The complaint charges that the Board has granted various members more selling time than is their due by allowing them to include unusable or unavailable warehouse space in their floor plans.

According to the complaint, the Wallace tobacco market is dominated and controlled by the Board of Trade. The authority and rules of the Board are generally acknowledged making it virtually impossible for new warehouses to conduct business in the area unless they are accepted as members of the Board and follow its policies.

However, the complaint notes that the warehouse members constitute the controlling voting majority on the Board. As a result, it charges, the Board is a mere instrumentality through which the members can put into effect and carry out illegal policies and practices.

The complaint cites the following as among the specific adverse effects of the Board's members' actions:

> Potential competitors have been prevented from entering the Wallace market;
>
> Farmers have been restricted, obstructed, and prevented from selling their tobacco at the warehouse of their choice in the Wallace area;
>
> The Board's warehouse members have acquired such a degree of control over the Wallace market that it has created, or tends to create, and threatens to perpetuate in them, a monopoly in the business of buying and selling tobacco on that market.

F. T. C. v. *Penick & Ford Ltd., Inc., et al.* (FTC Dkt. #8118, 8119, Complaints, Sept. 28, 1960).

Charges that two major manufacturers of food products have paid discriminatory advertising allowances to favored customers were announced by the Federal Trade Commission.

The FTC's separate complaints are against:

> (8118) Penick & Ford Ltd., Inc., New York City, a manufacturer of dessert preparations, corn and maple syrup, pie fillings, puddings and other items. Its annual sales exceed $50 million.
>
> (8119) Quaker Oats Co., Merchandise Mart Plaza, Chicago, Ill., which makes foods for both human and animal consumption and has annual sales of better than $300 million.

The complaint in each case alleges that the company has paid allowances to some customers without making them available on proportionally equal terms to all other competing customers, in violation of Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaints say, in 1959 Benner Tea Co., a retail grocery chain with headquarters in Burlington, Iowa, received discriminatory payments of $450 and $250 from Penick & Ford and Quaker Oats, respectively.

F. T. C. v. *American Oil Co.* (FTC Dkt. #8183, Complaint, Dec. 8, 1960).

American Oil Company, New York City, was cited in a Federal Trade Commission complaint for allegedly discriminating among its independent lessee-dealers in the prices charged for "Amoco" and "American" gasolines.

The complaint alleges that the company, commencing on or about October 1958, has sold the gasolines to certain dealers in and around Smyrna, Marietta and Rome, Georgia, and other areas, at prices lower than those charged other competing "Amoco" dealers.

The effect of these price discriminations has been or may be substantially to lessen or destroy competition with the favored retailers in violation of Sec. 2(a) of the Robinson-Patman Act, the complaint says.

F. T. C. v. *Asheville Tobacco Board of Trade* (FTC Dkt. #6490, Modified order, Nov. 3, 1960).

The Federal Trade Commission has clarified its cease and desist order requiring the Asheville Tobacco Board of Trade to discontinue unlawful restraints on new tobacco auction warehouses in the Asheville, North Carolina area.

The Commission's original order, issued February 14, 1958, was reviewed by the United States Court of Appeals for the Fourth Circuit, and the case remanded to the Commission to correct an ambiguity in the order and for "further consideration" of other aspects.

Accordingly, the Commission issued a tentative modified order to cease and desist and granted respondents leave to file objections. After hearings, the Commission adopted its tentative action as a final order.

In its opinion by Commissioner William C. Kern, the Commission rejected respondents' arguments that the tentative order would have an adverse competitive effect on the Asheville Burley tobacco market and was inappropriate because of recent developments on that market.

They contended that there is an excessive amount of floor space in the Asheville market, that a building war is now in progress there, that one warehouse firm is going out of business, that another threatens to monopolize the market, and that the Commission's order has promoted overbuilding, a tendency to monopolize, and the prospect of elimination of the smallest warehouse firm on the market.

However, Commissioner Kern stated: "We have reviewed the entire record on remand . . . and are of the opinion that the evidence

does not support respondents' contentions with respect to the current competitive situation on the Asheville market, nor does it indicate that the tentative order of the Commission may have an adverse effect on competition in this market."

Specifically the order forbids respondents to employ any plan, policy or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the size and capacity of the new entrant;

2. Limits the possible gain or loss in selling time allotted to any warehouse for any one selling season to 3½%, or any other unreasonably low percentage, of the selling time allotted to such warehouse for the preceding selling season, or in any other manner unreasonably limits the possible gain or loss in selling time allotted to any warehouse; or

3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville market, or any other warehouse doing business on that market, from competing on a fair and equal basis.

Rejecting respondents' argument that the Asheville tobacco market is overbuilt, the Commission said this contention is disproved by the evidence in the record.

"As a matter of fact," Commissioner Kern asserted, "there is ample evidence in the record to support the conclusion that insofar as the producers and buyers are concerned, conditions in the Asheville market have improved considerably within the past few years."

Respondents also have failed to show, Commissioner Kern said, that a building war is in progress in the Asheville market or that there is any likelihood of one in the future.

The record discloses that only two new tobacco warehouses have been built in Asheville in the past five years, he pointed out. Moreover, it shows that in 1954 there were 12 warehouses in Asheville with total floor space of 611,326 square feet and that this year there are nine warehouses with total floor space of 517,701 square feet.

"Since the record fails to indicate that there has been a building war on the Asheville market, we find no substance to respondents'

contention that the Carolina warehouse was withdrawn from the market because its owner, Farmers Federation Cooperative, did not have the financial resources to compete in a building war," Commissioner Kern said.

Furthermore, he asserted, "it is our opinion that there is nothing in the record to support respondents' offer of proof concerning the possibility of a single firm monopolizing the Asheville market."

The Commission also ruled against respondents' argument that because of the Commission's proposed order various warehouse firms have allowed entire warehouses to remain unused year after year solely for the purpose of retaining selling time.

"We think that the condition complained of by respondents, insofar as it exists, has been brought about, not by the Commission's tentative action, but by the rule of the Board of Trade which arbitrarily limits the loss of selling time alloted to a warehouse to 3½% of the selling time allotted to the warehouse for the preceding season," the Commissioner declared.

"In other words," he added, "by reason of this limitation on loss of selling time, a warehouse that has received a time allotment can remain unused for a long period of time without losing an appreciable amount of such selling time. For example, a warehouse can remain unused for ten years and still retain about 70% of its original allotted time. The Commission's order would prohibit this unreasonable limitation and thereby tend to discourage the practice of holding unused space solely for the purpose of retaining selling time."

F. T. C. v. *Di Giorgia Fruit Corp., et al.* (FTC Dkt. #8147-9, Complaints, Nov. 14, 1960).

The Federal Trade Commission has issued complaints charging the following Florida packers of citrus fruit with making illegal brokerage payments to some customers:

> Di Giorgia Fruit Corp., which has its principal office in San Francisco, Calif., and packs citrus fruit through its Florida Division at Fort Pierce (8147);
>
> Peoples Packing Co., Inc., Lakeland (8148);
>
> Indian Lake Fruit Co., Inc., Ochopee (8149).

The complaints allege that each packer makes numerous and substantial sales to some brokers and direct buyers purchasing for their

own account for resale and in many of these transactions pays brokerage or grants a discount in lieu of brokerage. This practice is forbidden by Section 2(c) of the amended Clayton Act.

F. T. C. v. *Venus Foods* (FTC Dkt. #7212, Order, Nov. 14, 1960).

Venus Foods, Los Angeles, Calif., has been ordered by the Federal Trade Commission to stop making illegal brokerage payments to purchasers of its bakery products.

Denying an appeal by the company, the Commission adopted with modification an initial decision filed last January 29 by Hearing Examiner Earl J. Kolb.

In its opinion by Commissioner William C. Kern, the FTC ruled that the additional 5% discount Venus granted to these customers purchasing fruit bars for their own account was a discount in lieu of brokerage, which is forbidden by Section 2(c) of the Robinson-Patman Amendment to the Clayton Act.

The three favored customers were Frito New York, Inc., New England Frito Corp., and Frito Tri-State Corp.

Prior to 1956, Commissioner Kern said, Venus sold its fruit bars throughout most of the country with the exception of the New York-New England area. To gain distribution in that area, on March 22, 1956, it appointed Henry M. Samplin Associates, Inc., New York City, as its executive broker for the territory on a 5% commission basis. Two months later, Venus discontinued the broker's services and entered into an agreement giving the Frito companies exclusive distributional rights in the area. The agreement also provided that sales to the Frito concerns be at the prevailing wholesale price less a customary 24% distributor discount, a 1% cash discount, and "a further discount of 5% for warehousing, handling and freight out."

"The record," stated Commissioner Kern, "contains no direct evidence that the 5% discount to the Frito companies constituted a brokerage payment or commission or was a discount in lieu thereof. Accordingly, any finding that such was the case rests on inferences to be drawn from the evidence. In our view, there are sufficient facts of record to support such a finding. In summary, these facts show that the 5% granted to the Frito companies was exactly the same as respondent allowed its broker for sales in the same area; the price, less the 5% discount, was the same at which respondent formerly

sold its fruit bars to distributors in the same area through its broker and was currently selling other distributors in surrounding areas through brokers; the 5% discount was granted Frito within a few days after cancellation of respondent's brokerage arrangement for the same area; and, in the terms of the agreement between Frito and respondent, the price at which respondent agreed to sell to Frito is designated as a 'wholesale price,' with respondent also agreeing not to grant any other company the right of selling the fruit bars at 'wholesale' within the territory. Thus, the facts in this case go far beyond those present in the *Robinson* case . . . cited by respondent, in which the facts showed that the seller after eliminating a broker, sold directly to all purchasers, and in which plaintiff placed only his unsupported conclusion that a reduction in price granted to a buyer from a manufacturer constituted a discount in lieu of brokerage."

The Commission ruled that the evidence does not support Venus' argument that the extra 5% discount was a functional discount granted to the Frito companies as regional distributors in return for warehousing the products and selling and transporting them to distributors who in turn sold to retailers.

It is our view, the opinion concluded, "that the facts fully support the hearing examiner's conclusion that the discount was for services rendered by Frito to itself as purchaser, owner and subsequent seller of the goods purchased and that such services do not bring this case within the exception of Section 2(c) by reason of services rendered. . . . Likewise, we agree with the hearing examiner that price discrimination which is covered by Section 2(a) of the Clayton Act is not necessary to a violation of Section 2(c). . . ."

F. T. C. v. *D. L. Clark Company* (FTC Dkt. #8154, Complaint, Nov. 14, 1960).

D. L. Clark Company, the manufacturer of "Clark Bar" and other candy products, was charged by the Federal Trade Commission with making discriminatory advertising payments to favored customers. The company has its main offices in Pittsburgh, Pa.

The FTC's complaint alleges that Clark makes payments to certain candy vending machine operators for advertising on their machines but does not make these payments available on proportionally equal terms to all other competing customers, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

Included among the favored customers, the complaint says, is Automatic Canteen Company of America, Chicago, Ill. In 1959, it received more than $100,000 in promotional payments from Clark.

According to the complaint the payments are granted to vending machine operators under "VenKard" promotional programs in which cards, approximately 8¾ inches by 5 inches, advertising Clark products are affixed to candy machines. Each "VenKard" program usually lasts from four to five weeks.

The payments are made for Clark by Richard A. Burleigh & Associates, Inc., an advertising agency in Evanston, Ill., the complaint alleges. The agency pays the favored customers approximately 68 cents for each machine carrying advertising of Clark products.

Clark had sales of approximately $10.7 million for the fiscal year ending February 28, 1959.

F. T. C. v. *Anniston Foundry Co.* (FTC Dkt. #8031, Consent order, Oct. 31, 1960).

Anniston Foundry Co., Anniston, Ala., a manufacturer of cast iron soil pipe and fittings, is prohibited by a Federal Trade Commission consent order announced from discriminating among its customers in paying advertising allowances.

The order was agreed to both by the company and the FTC's Bureau of Litigation. It was accepted in an initial decision by Hearing Examiner Leon R. Gross which the Commission affirmed.

In a complaint filed last June 30, the FTC charged that Anniston violated Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act by making payments to some customers for promoting its products but not making these allowances available to all other competing customers on proportionally equal terms.

The order requires that any future payments be on a proportionally equal basis only.

F. T. C. v. *Sue Records, Inc., et al.* (FTC Dkt. #7894 and 7915, Consent orders, Sept. 28, 1960).

The Federal Trade Commission has approved consent orders forbidding two New York City concerns to give undercover "payola" to anyone to get their records broadcast. They are:

Sue Records, Inc. and Henry Murray, Jr., an official (7894); and

Apollo-Records N. Y. Corp. and Melvin Albert, an official (7915).

The Commission affirmed separate initial decisions by Hearing Examiners Leon R. Gross and Robert L. Piper accepting orders agreed to both by the respondents and the FTC's Bureau of Litigation.

In its earlier complaints, the FTC charged both companies with paying money or other valuable consideration to radio and television disc jockeys or other personnel of broadcasting stations to have their records "exposed" (broadcast regularly).

The disc jockeys conceal the fact that payments have been received for broadcasting the songs, and mislead listeners into believing these records are selected strictly on their merits or public popularity, the complaints said.

This deception, the complaints alleged, tends to mislead purchasers into buying records they might not otherwise have purchased, and also to advance these recordings in popularity polls, which in turn tends to increase their sales substantially.

The orders specify that the respondents must not offer or give, without requiring public disclosure, any material consideration to anyone to induce the selection and broadcasting of records in which they have any financial interest.

"Public disclosure" means that the recipient must disclose to listeners when the record is played that this is in return for compensation received by him or his employer.

F. T. C. v. *Alfonso Gioia & Sons, Inc.* (FTC Dkt. #7790, Consent order, Oct. 31, 1960).

A consent order announced by the Federal Trade Commission forbids Alfonso Gioia & Sons, Inc., a macaroni manufacturer in Rochester, N. Y., to favor any customers with discriminatory prices, advertising allowances and demonstrator services.

Both the company and the FTC's Bureau of Litigation agreed to the order. It was accepted in an initial decision by Hearing Examiner Harry R. Hinkes, which the Commission affirmed.

The FTC issued its complaint last February 25, charging that Gioia violated Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act by giving some customers substantial discounts, through

special prices and free goods, which were not offered to competing customers.

For example, the complaint said, in the Cleveland, Ohio trading area these preferential discounts were granted to Foodtown Purchasing Co., The Kroger Co., and Stop-N-Shop Super Markets.

Gioia also was charged with paying advertising allowances and furnishing special personnel known as "demonstrators" to favored customers but failing to make these available on proportionally equal terms to all competing customers, as required by Sections 2(d) and (e) respectively, of the statute.

The order requires Gioia to charge the same net prices to competing customers, and forbids it to pay allowances or furnish services or facilities to them except on a proportionally equal basis.

The complaint had alleged that Gioia's price discriminations may substantially lessen competition or tend to create a monopoly both in the lines of commerce engaged in by the company itself ("primary line") and by its customers ("secondary line").

The order dismisses the "primary line injury" charge because "the evidence in the light of subsequent developments is insufficient to substantiate that allegation."

F. T. C. v. *Jack M. Berry & Co., Inc.* (FTC Dkt. #8164, Complaint, Nov. 18, 1960).

The Federal Trade Commission charged in a formal complaint that Jack M. Berry & Co., Inc., a brokerage concern in New York City, has illegally received brokerage on purchases of citrus fruit for its own account for resale.

Berry makes numerous purchases for its own account from Florida citrus fruit packers and accepts brokerage or a discount in lieu of brokerage, which is prohibited by Section 2(c) of the amended Clayton Act, the complaint alleges. It adds that these transactions represent a substantial part of the concern's business activities.

F. T. C. v. *National Fiorita Fruit Co.* (FTC Dkt. #8055, Consent order, Dec. 5, 1960).

National Fiorita Fruit Co., St. Louis, Mo., is prohibited from receiving illegal brokerage on its own purchases, under the terms of a consent order approved by the Federal Trade Commission.

The Commission adopted an order by Hearing Examiner Abner E. Lipscomb, which had been agreed to by both the company and the FTC's Bureau of Litigation.

Last July 26, the FTC issued its complaint alleging that National Fiorita accepts brokerage or a discount in lieu of brokerage on purchases of citrus fruit for its own account for resale from Florida packers, in violation of Section 2(c) of the amended Clayton Act.

F. T. C. v. *Aluminum Company of America, et al.* (FTC Dkt. #8175-7, Complaints, Dec. 5, 1960).

The Federal Trade Commission announced complaints against the following three distributors of grocery items on charges of paying discriminatory allowances to favored customers:

(8175) Aluminum Company of America, Pittsburgh, Pa., which manufacturers "Alcoa Wrap" foil and other aluminum products.

(8176) Paxton and Gallagher Co., Omaha, Nebr., a roaster of coffee.

(8177) S. C. Johnson & Son, Inc., Racine, Wisc., a manufacturer of chemical specialties, such as floor waxes, furniture polishes, automotive waxes and polishes, insecticides and space deodorants.

The complaints state that the Aluminum Company of America (Alcoa) has total sales of more than $850,000,000 annually, that S. C. Johnson's annual sales exceed $50,000,000, and Paxton and Gallagher's exceed $1 million annually.

The FTC alleges that each company has paid advertising allowances to Benner Tea Co., a retail grocery chain with headquarters in Burlington, Iowa, but failed to make them available on proportionally equal terms to all other competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act.

According to the complaints, in 1959 Benner received preferential payments of $350 from Johnson and $150 from both Alcoa and Paxton and Gallagher.

F. T. C. v. *The Quaker Oats Co.* (FTC Dkt. #8112, Complaint, Sept. 26, 1960).

The Quaker Oats Co., Chicago, Ill., has been charged by the Federal Trade Commission with giving discriminatory prices to favored purchasers of its oat flour.

The company sells oat flour in bulk to large industrial users for processing into cereals, baby foods and other food products. It does not have a formal price list for the product but submits prices in response to requests for bids or solicits business on an offer and acceptance basis.

The FTC's complaint alleges that some purchasers are charged from 1% to 5% more than others who compete with them in processing and reselling either the flour itself or products containing it in substantial amounts.

The price spread between favored and unfavored customers has been as much as 24 cents per hundredweight, the complaint says. It adds that a differential ranging from 5 cents to 10 cents per hundredweight is enough to cause a purchaser to buy from the supplier quoting such lower price.

Alleging violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint contends that the effect of these price discriminations may be substantially: (1) to lessen competition or tend to create a monopoly in the lines of commerce in which Quaker Oats and its favored customers are engaged, and (2) to destroy competition between Quaker Oats and its competitors as well as between purchasers of its oat flour. In addition, the pricing practices allegedly have a dangerous tendency to hinder competition or to create or further a monopoly in the company.

F. T. C. v. *Simmons Co.* (FTC Dkt. #8116, Complaint, Sept. 26, 1960).

The Federal Trade Commission announced charges that Simmons Co., New York City, a large manufacturer of mattresses, box springs, dual purpose upholstered sofas and other household furniture, has discriminated among its customers in paying advertising allowances.

The terms of the Simmons Cooperative Advertising Plan, used by the company since January 1, 1959, are tailored to exclude all but larger customers, the FTC's complaint alleges.

As an example of this plan, the complaint says, during 1959 Simmons paid to John Wanamaker and to Lit Bros., both of Philadelphia, Pa., more than $2,400 and $4,000, respectively, for adver-

tising or other services. These allowances were not made available on proportionally equal terms to all other competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act, the complaint charges.

It adds that Simmons similarly has favored other large retailers in Philadelphia and in other cities over their competitors.

Simmons operates 11 plants and 60 warehouses throughout the country. In 1959 its net sales exceeded $132.6 million.

F. T. C. v. *Illinois Men's Apparel Club, Inc., et al.* (FTC Dkt. #8115, Complaint, Sept. 26, 1960).

The Federal Trade Commission charged that Illinois Men's Apparel Club, Inc., Chicago, and National Association of Retail Clothiers and Furnishers, Washington, D. C., and their more than 2,600 members with illegally conspiring to boycott manufacturers of men's and boys' clothing who sold their branded products to catalog and discount houses.

In 1957, the FTC's complaint says, the membership of Illinois MAC consisted of some 300 retailers of men's and boys' clothing and 300 sales representatives of manufacturers. More than 2,000 retailers throughout the country belonged to NARCF.

Joined in the complaint are 42 officers and directors of Illinois MAC and 31 officers and directors of NARCF. They are cited as representative of the entire membership of the two associations because it would be impractical to name each member.

Some time prior to January 21, 1957, the retailer members of Illinois MAC became alarmed at the increasing sales of branded products by catalog and discount houses offering the merchandise for sale, in some instances at less than the usual retail price, the complaint says. It alleges that Illinois MAC conspired with NARCF to force manufacturers and distributors of branded products to stop selling to catalog and discount houses.

The following were among the methods used to accomplish this, the complaint states: Members maintained constant surveillance of all catalog and discount houses and the names of manufacturers or distributors whose branded products were detected were reported and publicized to the entire membership of both associations and others. Illinois MAC and NARCF sent letters to these manufacturers or distributors requesting information as to their policy regarding such

sales. Retailer members of the two associations also sent letters threatening to stop buying unless such sales were discontinued.

Alleging violation of Section 5 of the FTC Act, the complaint charges that the conspiracy had these and other adverse results:

> To cause manufacturers or distributors to stop selling branded products to catalog and discount houses;
>
> To eliminate competition between operators of catalog and discount houses and retailers in the retail sale of branded products;
>
> To place in respondents' hands control over the business practices of manufacturers or distributors of branded products, and to deprive the latter of the right to choose their own customers;
>
> To unreasonably suppress competition in the sale, at retail, of branded products in Illinois and elsewhere.

F. T. C. v. *Shamrock Foods, Inc., et al.* (FTC Dkt. #7576, Consent order, Sept. 27, 1960).

The Federal Trade Commission announced approval of a consent order forbidding Shamrock Foods, Inc., and Food Guild Corp., Evanston, Ill., and Robert M. Buchanan, their president, to receive unlawful brokerage payments.

The order was agreed to both by the respondents and the FTC's Bureau of Litigation. It was accepted by Hearing Examiner Edward Creel in an initial decision, which the Commission affirmed.

Shamrock is a large wholesale distributor of canned and packaged food and Food Guild is a brokerage firm. The FTC's complaint of September 1, 1959, alleged the respondents accepted brokerage commissions on Shamrock's purchases for its own account through Food Guild.

These arrangements violate Sec. 2(c) of the amended Clayton Act, which forbids the receipt of brokerage where both the buyer and broker are owned and controlled by the same individual, the complaint charged.

F. T. C. v. *American Ball Bearing Corp.* (FTC Dkt. #7565, Init. Dec., Nov. 10, 1960).

A Federal Trade Commission hearing examiner has issued an order which would require American Ball Bearing Corp., Brooklyn, N. Y.,

to stop discriminating in price among competing purchasers of its "ABC" automotive bearings.

The order was contained in an initial decision by Hearing Examiner Edward Creel.

Acting on the FTC's complaint of August 7, 1959, the examiner found that the company illegally favors certain of its customers by granting them larger discounts than those granted other competing customers. This practice, he ruled, violates Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

Examiner Creel said that American classifies purchasers of its automotive bearings into three categories—jobbers, distributors and warehouse distributors—and charges them different prices. Jobbers are charged about 10% more than distributors and about 20% more than warehouse distributors, while distributors are charged approximately 10% more than warehouse distributors.

"The respondents' classification of some of the purchasers of its products is arbitrary," the examiner asserted. He added that "respondents have made no attempt to insure that purchasers classified as distributors and warehouse distributors performed the functions expected of them to qualify for their respective discounts, and did not compete with each other or with jobbers."

"Many purchasers, classified by respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications," Examiner Creel said.

For example, he pointed out that respondents have classified as warehouse distributors Southern California Jobbers, Inc. (SCJ) of Los Angeles, Calif., and Southwestern Warehouse Distributors, Inc. (SWD) of Dallas, Texas. Both of these companies, he said, are merely buying offices for automotive-parts jobbers who are members of the respective groups. SCJ has 63 members and SWD more than 40.

"Individual jobbers, in competition with distributors and members of buying groups classified as warehouse distributors, are placed at a competitive disadvantage by having to pay 10% to 20% more for ABC bearings than their competitors, thereby resulting in injury to competition," Examiner Creel ruled.

Rejected by the examiner was respondents' argument that competition may not be adversely affected unless a price advantage to a buyer is reflected in the buyer's resale price, thus diverting business from non-favored buyers on the basis of price alone.

"This condition is not sound," he said. "Although there is no evidence in the record of any price-cutting by any of respondents' customers, the Commission and the courts have repeatedly pointed out that a price advantage may be used in many other ways to lessen competition. It is not necessary that it be shown in what way it was done, or that business has actually been diverted, in order for a finding to be made that the statute has been violated."

Accordingly, his order would forbid American to charge any customer net prices higher than those charged any other competitor.

F. T. C. v. *Cutter Laboratories, Inc.* (FTC Dkt. #7840, Consent order, Nov. 7, 1960).

Cutter Laboratories, Inc., Berkeley, Calif., has consented to a Federal Trade Commission order forbidding it to charge competing customers different net prices for its human and animal biologicals and pharmaceuticals or other products.

The company is the legal successor to Cutter Laboratories, which was named originally in the FTC's complaint of last March 21. The predecessor concern was merged with Robert K. Cutter Company last May 10 and the present corporate name was adopted.

The Commission affirmed Hearing Examiner Edward Creel's initial decision based on an order agreed to both by the respondent and the FTC's Bureau of Litigation.

The complaint charged that high-volume purchasers receive better prices than competing low-volume customers in Cutter Laboratories' two general lines, "human products" and "veterinary products," in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

Within both groups, customers are placed into functional categories such as Doctor (#14), pharmacy (#10), service retailer (#13), hospital clinic (#41), etc., the complaint said, citing these typical price discriminations in the "human products" category:

> All #10 customers are given a cumulative discount of 15% on invoices totaling $50 or more, 7½ on invoices from $25.00 to $49.99, and no discount at all on those under $25. Thus, a low

> volume #10 purchaser pays a higher net price than competing high volume purchasers in the same group.
>
> Also, all #13 purchasers, some of whom compete with #10 buyers in reselling Cutter's products, receive a straight 15% discount on virtually all items regardless of total volume. The result is that a #13 customer gets a 15% price advantage over a competitor in group #10 where both purchase less than $25.

The complaint had alleged that these price discriminations may substantially lessen competition or tend to create a monopoly in the lines of commerce in which Cutter and its purchasers are engaged.

The order dismisses this allegation insofar as it relates to Cutter's line of commerce.

Department of Justice Activity

U. S. v. *Standard Oil Company (N. J.), et al.* (U. S. D. C. S. D. N. Y., Consent judgments, Nov. 14, 1960).

Attorney General William P. Rogers announced the entry in the United States District Court in New York of consent judgments, signed by Judge John M. Cashin, against two major United States oil companies, defendants in the civil action entitled *United States* v. *Standard Oil Company (New Jersey), et al.* A judgment against defendant Standard Oil Company (New Jersey) provides for the division of the assets of Standard Vacuum Oil Company between its joint owners, Standard of New Jersey and Socony Mobil Oil Company, Inc., a third defendant. A judgment against defendant Gulf Oil Corporation, which has no comparable joint marketing set-up, provides for a set-aside of 100,000 barrels per day of that company's large crude oil production in Kuwait for a period of 10 years, for the benefit of independent oil companies.

This litigation which has been in progress since 1953 involves the foreign operations of the major international oil companies.

The final judgments entered against the two defendants are to continue in force for a period of 25 years. The judgments enjoin the two defendants from entering into any agreement or combination to fix prices, divide markets, or allocate production with any competitors engaged in the production, refining, distribution or sale of crude oil or petroleum products. Further, the judgments forbid the

two defendants from entering into such agreements to limit importation of crude oil or petroleum products into, or their exportation from the United States, restrict the sale or distribution of petroleum products in foreign nations, or exclude third persons from competing in the production, refining, distribution or sale of crude oil.

These injunctions apply to any combination affecting the trade or commerce of the United States with foreign nations. Exceptions are provided with respect to requirements of foreign law, or an official request of a foreign government, failure to comply with which would subject the defendants to the risk of losing that part of the business subject to the request. The defendants are further prohibited, subject to certain exceptions such as a requirement of foreign law, from participating in joint marketing companies with any of the other defendants which are subject to a similar judgment, and from acquiring an interest in joint marketing companies controlled by British Petroleum Company, Ltd. or the Royal Dutch Shell partnership, or controlled by such companies in conjunction with defendants.

The judgment against defendant Standard Oil Company (New Jersey) provides that most of the assets of Standard-Vacuum Oil Company shall be divided between the two partners, Standard of New Jersey and Socony Mobil. Standard Vacuum, with assets of $855 million, is primarily a marketing company in the Far East, with sales of over a billion dollars in 1959. It also has crude oil production of 84,000 barrels per day and a total refinery throughput of 234,000 barrels per day, and operates a half dozen refineries in the Far East. Following a division of the assets of Standard-Vacuum Company, each of the partners, Standard of New Jersey and Socony Mobil will operate independently in areas formerly served by the joint company.

The judgment expressly does not cover joint production, refining and pipeline operations which are located solely within a foreign country or countries. But such joint companies, controlled by defendants subject to judgments such as those entered today, may not engage in marketing, with certain exceptions such as a requirement of foreign law. Each participant in such an arrangement must market independently. Additionally, exceptions as to operations in certain countries are provided.

U. S. v. *A P Parts Corporation and Goerlich's, Inc., et al.* (U. S. D. C. N. D. Ohio, Complaint, Nov. 10, 1960).

Attorney General William P. Rogers announced filing of a civil antitrust suit in the United States District Court at Toledo, Ohio, charging A P Parts Corporation and Goerlich's, Inc., both of Toledo, with violating Section 1 of the Sherman Act and Section 3 of the Clayton Act through exclusive dealing arrangements in the sale and distribution of replacement mufflers, tail pipes, and exhaust pipes for auto exhaust systems.

Goerlich's, Inc.; A P Parts; Oldberg Manufacturing Company; Belond Industries, Inc.; McKenzie Muffler Corp.; and Gibbons Tubewell are under management and control of John Goerlich and trusts established by him and his immediate family. The same interests own a substantial part of the stock of Compo Corporation.

According to the complaint, the replacement market for automotive exhaust systems and parts, next to tires, accounts for the largest dollar volume of all replacement parts used to maintain the approximately 68,000,000 passenger autos registered in the United States. In 1959 domestic sales of automotive exhaust systems and parts in the replacement trade exceeded $160,000,000.

The complaint stated that the Goerlich group is the largest supplier of auto exhaust systems and parts for the replacement trade, accounting for 42 percent of the total dollar volume of such manufacture and sales in 1959.

The Goerlich group was referred to in the complaint as a "full line" company—one which manufactures and sells virtually complete lines of automotive exhaust systems and parts for the replacement trade, consisting of more than 1300 models of mufflers, exhaust pipes and tail pipes.

It was charged that beginning "Some time prior to 1957 and continuing" the defendants entered into agreements, contracts and understandings with more than 7,300 jobbers and distributors under which the distributors and jobbers purchase their auto exhaust systems and parts for resale exclusively from the Goerlich group and refrain from purchasing and reselling such systems and parts offered by competitors of Goerlich.

The complaint further charged that in order to effectuate contracts, agreements and understandings, the defendants have:

(a) refused to sell automotive exhaust systems and parts to distributors who buy any of such products from a competitor;

(b) induced, persuaded, and coerced distributors not to resell automotive exhaust systems and parts to jobbers who buy any of such products from a competitor;

(c) regularly inspected and examined the inventories of distributors and jobbers to ascertain whether said distributors and jobbers have purchased automotive exhaust systems and parts from a competitor.

Effects of the agreements, contracts, understandings and actions of the Goerlich group, as listed by the Government, were:

(a) manufacturers and distributors of automotive exhaust systems and parts for the replacement market have been denied access to and have been excluded from a substantial part of the market for said products, and competition between the defendants and said competitive suppliers for said substantial part of the market has been eliminated;

(b) a substantial number of distributors, jobbers, and retailers have been denied the opportunity to purchase automotive exhaust systems and parts from manufacturers, distributors, and jobbers of their own selection in accordance with consumer demand and at prices established by free and open competition;

(c) the trade and commerce passing through more than 7300 distributors and jobbers of the defendants has been preempted and unreasonably restrained by the defendants, thereby depriving the consuming public of the advantages of free competition for and between said distributors, jobbers, and their retailers, where the automotive exhaust systems and parts of other manufacturers and distributors would normally be available;

(d) distributors and jobbers have been coerced by defendants into dealing exclusively in defendants' automotive exhaust systems and parts.

The Government asked the court to decree that the defendants "unreasonably restrained and substantially lessened competition and tending to create a monopoly"; that the agreements, contracts and understandings be declared illegal under the Sherman and Clayton Acts; that the defendants be ordered to cancel such agreements, con-

tracts and understandings, and that the defendants be enjoined from such actions in the future.

U. S. v. *Sangamo Electric Co., et al.* (U. S. D. C. E. D. Pa., Indict., Oct. 21, 1960).

Attorney General William P. Rogers announced a federal grand jury at Philadelphia returned an indictment charging Sangamo Electric Company, Springfield, Illinois; General Electric Company, New York City; and Westinghouse Electric Corporation of Pittsburgh with violation of the Sherman Antitrust Act through a combination and conspiracy to fix and maintain prices for the sale of watt-hour and demand meters.

At the same time a companion civil case was filed in U. S. District Court in Philadelphia charging the same three defendants with a violation of the Sherman Act and asking injunctive relief against the practices alleged.

The indictment charges that beginning at least as early as January, 1956, Sangamo, General Electric and Westinghouse engaged in a conspiracy to fix and maintain prices for watt-hour and demand meters and to sell the meters to private and governmental utilities at the agreed upon prices.

It was charged that during the past five years, representatives of the defendant firms discussed and agreed upon prices for watt-hour and demand meters at meetings held in Boston, Chicago, New York, St. Petersburg, Florida, and Atlantic City, New Jersey.

According to the indictment a six percent price increase for watt-hour and demand meters was discussed and agreed upon in a Boston hotel in January 1956, while on four additional occasions (April 1957, November 1957, August 1958 and November 1958) representatives of Sangamo, General Electric and Westinghouse met and agreed on additional price increases, all of which were put into effect.

Both the indictment and the civil complaint allege that the defendants used various means to avoid detection of the conspiracy, such as: use of plain envelopes addressed to the residences of the corporation representatives, rather than to their offices, without identification of the senders; placing of telephone calls from and to residences rather than the offices of the firm representatives; and the destruction of written communications shortly after their receipt.

Watt-hour meters were described as devices that measure and register electric energy in watt-hours and kilowatt hours. They are installed by utility companies on the premises of electric power consumers to determine for billing purposes the amount of electricity used. Demand meters are used to determine the maximum rate of power consumption during specific intervals over a given period.

The defendants together with Duncan Electric Company (not named in the case) are alleged to be the only United States manufacturers of the meters and their total sales in 1959 are said to be in excess of $71,000,000.

Both the complaint and indictment charged effects of the practices by the defendants were:

> (a) Prices of meters throughout the Uinted States have been raised, fixed, and maintained at high and artificial levels;
>
> (b) Price competition in the sale of meters throughout the United States has been restrained, suppressed, and eliminated;
>
> (c) Purchasers of meters throughout the United States have been deprived of the benefits of free competition in the purchase of these products; and
>
> (d) Public agencies engaged in the generation, transmission, or distribution of electricity have been denied the right to receive competitive sealed bids as required by law, and have been forced to pay high, artificially-fixed prices for meters.

Conviction of the violation charged in the indictment (under 15 U. S. C. Section 1) could result in a fine up to $50,000 against each of the defendants.

Relief sought by the government in a civil case includes: requiring the defendants to issue new price lists based upon cost independently arrived at; to prevent any communication among the defendants with respect to further prices and bids; and to enjoin each of the types of activities alleged to be part of the conspiracy. Relief sought in this case is similar to that asked in 19 previous cases against manufacturers of electrical equipment.

U. S. v. *Ryder System, Inc.* (U. S. D. C. S. D. Fla., Complaint, Oct. 3, 1960).

Attorney General William P. Rogers announced the filing in the United States District Court for the Southern District of Florida of a civil antitrust complaint alleging that a series of acquisitions of truck renting and leasing companies by Ryder System, Inc. violates Section 7 of the Clayton Act.

Ryder, the second largest truck renting and leasing company in the United States, during the past five years has acquired the stock or assets (including, among other things, over 8,500 vehicles, lease contracts, garages and other facilities) of some 30 companies engaged in the truck renting and leasing industry in various geographical areas of the United States at a cost of about $20,000,000.

Section 7 of the Clayton Act makes unlawful acquisitions and mergers, the effects of which may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country. This suit charges that the effect of the acquisitions made by Ryder has been to eliminate competition between Ryder and the acquired companies, and among the acquired companies themselves, in truck renting and leasing, and to lessen competition and increase the tendency to concentration and monopoly in the industry generally. The suit also charges that the acquisitions have resulted in the elimination of the acquired companies as independent competitive factors in the industry and in the enhancement of Ryder's competitive advantage over other truck renting and leasing firms to the detriment of competition.

The suit seeks to require Ryder to divest itself of those acquired companies which have contributed to the anticompetitive effects alleged in the complaint. It also seeks to prevent Ryder from acquiring additional companies where such acquisitions will result in elimination of competition or tendency toward monopoly in this relatively new and fast growing industry. The suit thus has as its prime purpose the preservation of the opportunity for independent businessmen to share in this industry.

U. S. v. *Firstamerica* (U. S. D. C. N. D. Cal., Stipulation, Sept. 30, 1960).

Attorney General William P. Rogers announced that a stipulation and letter have been filed in the Federal District Court for the Northern District of California which provide for the divestiture by Firstamerica of a New Bank with approximately $500,000,000 in

deposits as a step toward the disposition of the pending Firstamerica case.

On March 30, 1959, the Department of Justice filed a complaint attacking the acquisition by Firstamerica of the stock of California Bank. According to the terms of a letter from Robert A. Bicks, Assistant Attorney General in charge of the Antitrust Division, to Firstamerica Corporation, Firstamerica will seek approval of the Federal Reserve Board to establish a New Bank with 65 branches and approximately $500,000,000 of deposits. The New Bank will have branches throughout the State of California. This bank will thus join Bank of America and Firstamerica in offering statewide banking facilities after the transactions now planned are carried out.

The letter provides that Firstamerica will make application to the Federal Reserve Board under the provisions of Public Law 86-463 for approval to carry out the steps necessary to the formation of the New Bank. It also provides that after the New Bank has been in operation for two years, Firstamerica will take such steps as may be necessary to accomplish a prompt divestiture of the stock or assets of the New Bank.

U. S. v. *Monsanto Chemical Co., et al.* (U. S. D. C. S. D. N. Y., Complaint, Oct. 5, 1960).

Attorney General William P. Rogers announced filing of a civil antitrust complaint in U. S. District Court at New York charging American Cyanamid Company with Sherman Act and Clayton Act violations through a conspiracy with six other firms to restrain and monopolize interstate and international trade in melamine and melamine products.

Co-conspirators not named as defendants were identified in the complaint as:

Monsanto Chemical Co., St. Louis, Missouri;
Ciba Products Corp., Fairlawn, New Jersey;
Ciba Ltd., Basle, Switzerland;
British Industrial Plastics Ltd., London, England;
Société des Produits Azotes, Paris, France;
The British Oxygen Company Ltd., London, England.

Melamine resins, made from melamine, provide chemical additives for the manufacture of unbreakable dinnerware and formica, add

waterproofing or flameproofing qualities to fabrics, strengthen paper products and fabrics and supply hardness to paint.

The complaint charges that beginning in 1937, American Cyanamid has monopolized melamine and all products fade from melamine resins through an illegal agreement made with the six foreign and domestic companies in order to exploit the competitive advantage which American Cyanamid had in the manufacture and sale of melamine by reason of a patent license and through exclusive control of dicyandiamide, the raw material from which melamine is made. The complaint stated that substantially all of the dicyandiamide produced in North America is manufactured by American Cyanamid.

According to the complaint American Cyanamid has adjusted price differentials between melamine and its basic raw material to discourage melamine manufacture and caused foreign manufacturers of melamine to refuse to sell melamine to anyone in the United States not approved by American Cyanamid.

It was also charged that American Cyanamid has acquired the Formica Company and the Panelyte Division of St. Regis Paper Company of Canada both of which are alleged to be leading consumers of melamine laminating resins, in order to prevent others from selling melamine or melamine products to those two firms.

Acquisition of the two companies was alleged to be a violation of the Clayton Act because of a tendency to lessen competition or create a monopoly in United States trade of melamine and melamine products.

Overt effects charged were:

(a) Prices of melamine, melamine containing products and consumer products made therefrom have been maintained at unreasonably high and artificial levels;

(b) Effective competition between manufacturers of melamine containing products has been suppressed;

(c) Actual and potential foreign and domestic competition in melamine has been foreclosed;

(d) Progress in the development of manufacturing melamine from materials other than dicyandiamide has been suppressed;

(e) Progress in the development of new uses for melamine has been discouraged and impeded to the detriment of the public interest;

(f) The public has been deprived of an ample supply of melamine and melamine containing products.

In 1958, American Cyanamid Company allegedly produced 50,000,000 pounds of melamine, or more than 50 percent of the melamine produced in the world and approximately 86 percent of that produced in the United States.

The complaint charged that American Cyanamid has been the sole producer of melamine for sale in the United States during most of the period covered by the complaint. In 1958, it was charged, domestic sales of melamine products totaled 98,776,000 pounds valued at $39,000,000 and American Cyanamid accounted for 60 percent of that total.

The complaint asks that American Cyanamid be required to divest itself of ownership of Formica Company and the Panelyte Division of St. Regis Paper Company and that American Cyanamid be prohibited from refusing to sell either the raw material or melamine and products containing melamine to any buyer willing to purchase the same at reasonable prices.

U. S. v. *Maryland and Virginia Milk Producers Assn.* (U. S. D. C. D. D. C., Consent decree, Nov. 22, 1960).

Acting Attorney General Lawrence E. Walsh announced that a consent decree had been filed in United States District Court, Washington, D. C., terminating litigation which began in 1956, against the Maryland and Virginia Milk Producers Association.

The government charged on November 21, 1956 that the Maryland and Virginia Milk Producers Association has monopolized supplying of milk to dairies in the Washington metropolitan area in violation of the Sherman Act and violated the antimerger provisions of the Clayton Act by acquisitions of dairies.

The consent judgment entered disposed of monopolization charges which were reinstated last May after the United States Supreme Court overturned a District Court dismissal.

The dismissal in the lower court was based on the theory that the farmers' cooperative was not subject to antitrust prosecution for monopolistic practices.

At that time, however, the Supreme Court upheld a District Court order requiring the association to divest itself of the assets of Embassy Dairy, Inc., of Washington which it had unlawfully acquired in 1954.

This judgment required the association also to relinquish the assets of Richfield and Wakefield dairies, acquired by the association in 1957, and prohibited the association from engaging in any phase of distribution or sale of fluid milk in the Washington area for five years, with the exception of sale of milk to the Armed Forces.

Terms of the judgment also enjoined the association from: Refusal to sell milk to any dealer for fluid utilization; use of any sales plan which assigns purchase quotas to dealers; from coercing dealers to purchase milk from the association; from making loans to dealers and from interfering with sources of supply of dealers.

In addition, the judgment barred the Association from: boycotting to compel purchases of milk; retaliating against a dealer who obtains business of the association or of its customers; discriminating among its customers; interfering with the transportation of milk of other suppliers and from charging different prices for milk intended for the same use in the Washington area.

Another provision requires the association, upon request, to release from membership contracts, milk producers who independently supplied Embassy dairy before association acquisition in 1954. The judgment also bars membership contracts which may not be terminated in any one year period at option of the member.

Other Cases

Fred Johnson Cement Block Co. v. *The Waylite Co. and Zenith Concrete Products Co.* (U. S. D. C. D. Minn., dated June 22, 1960).

The plaintiff was allowed to name two additional defendants in a private antitrust action, since the jurisdiction of the Court would not be affected in any way.

Sunkist Growers, Inc. and The Exchange Orange Products Co. v. *Winckler and Smith Citrus Products Co. and Walker* (C. A. 9th Cir., dated Sept. 30, 1960).

However, the decision was remanded because proof of damages was inadequate. Evidence on the issue of an inferior product should have been received (even though after-acquired) because it provided an alternative explanation for the loss of business. Estimates (by plaintiff) of probable profits should have been rejected. And allowing the plaintiff to point to a loss of 1.54% of its supply of oranges (the amount obtained from the defendant in the penultimate year, down from the maximum of only 18%) as the "sole" reason for bankruptcy and loss of the processing plant made the entire award conjectural.

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